

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the District of Columbia

APRIL TERM, 1934.

No. 6282

— 591

CARY A. HARDEE, RECEIVER, FEDERAL AMERICAN NATIONAL BANK AND TRUST COMPANY, A CORPORATION, JAMES F. T. O'CONNOR, COMPTROLLER OF THE CURRENCY, APPELLANTS,

vs.

AMERICAN SECURITY AND TRUST COMPANY, A CORPORATION.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED AUGUST 10, 1934.

PRINTED AUGUST 29, 1934.

United States Court of Appeals for the District of Columbia

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vs.

AMERICAN SECURITY AND TRUST COMPANY, A CORPORATION, APPELLEE.

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United States Court of Appeals for the District of Columbia

No. 6282

CARY A. HARDEE, Receiver, Federal American National
Bank and Trust Company, a Corporation, et al., Appel-
lants,

vs.

AMERICAN SECURITY AND TRUST COMPANY, a Corporation.

a Supreme Court of the District of Columbia.

Equity. No. 56594.

AMERICAN SECURITY AND TRUST COMPANY, a Corporation,
Plaintiff,

vs.

CARY A. HARDEE, Receiver, Federal American National
Bank and Trust Company, a Corporation; James F. T.
O'Connor, Comptroller of the Currency, and Reconstruc-
tion Finance Corporation, a Corporation, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the
District of Columbia, at the City of Washington, in said
District, at the times hereinafter mentioned, the following
papers were filed and proceedings had, in the above-entitled
cause, to wit:

Bill for Receiver.

Filed December 22, 1933.

In the Supreme Court of the District of Columbia.

Equity. No. 56594.

AMERICAN SECURITY AND TRUST COMPANY, a Corporation,
Plaintiff,

vs.

CARY A. HARDEE, Receiver, Federal American National
Bank and Trust Company, a Corporation; James F. T.
O'Connor, Comptroller of the Currency, and Reconstruc-
tion Finance Corporation, a Corporation, Defendants.

The bill of complaint of the American Security and Trust
Company respectfully represents unto the Court as fol-
lows:

1. Plaintiff is a corporation duly organized and existing
under the laws of the United States in force in the District
of Columbia and brings this suit in its own right as owner
of the secured notes hereinafter described.

2. Defendant Cary A. Hardee is a citizen of the United
States temporarily residing in the District of Columbia and
he is sued as Receiver of the Federal American National
Bank and Trust Company, a corporation. Defendant James
F. T. O'Connor is a citizen of the United States temporarily
residing in the District of Columbia and he is sued as Com-
ptroller of the Currency. Defendant, Reconstruction Finance
Corporation, is a corporation created by Act of Congress
approved January 22, 1932, (47 Stats. L. 5) and is sued in
its own right as the party secured by the second deed of
trust described in Paragraph 8 hereof.

3. On December 12th, 1927, plaintiff loaned Leslie E. F.
Prince the sum of one hundred and twenty-five thousand
dollars (\$125,000.00) for which he executed and delivered
to plaintiff thirty-five promissory notes, dated De-
cember 12th, 1927, payable to the order of plaintiff
three (3) years after said date, notes Nos. 1 to 10,
inclusive, being for \$2,500 each, Nos. 11 to 20, inclusive,

being for \$3,000 each, Nos. 21 to 25, inclusive, being for \$4,000 each and Nos. 26 to 35, inclusive, being for \$5,000 each, each of said notes bearing interest at the rate of $5\frac{1}{2}\%$ per annum, payable semi-annually, and to secure prompt payment of the principal of and interest upon said notes, said Leslie E. F. Prince and Helen B. Prince, his wife, on the same date, executed and delivered a deed of trust, in the usual form, to National Savings and Trust Company, a corporation, as Trustee, covering the following real property in the District of Columbia:

Lot Sixty-six (66) and part of Lot Sixty-seven (67) in Harry Wardman and Harry B. Willson's Subdivision of lots in Block Thirty-nine (39) of "North Grounds of Columbian College", as per plat recorded in Liber County No. 22, folio 72 of the Records of the Office of the Surveyor of the District of Columbia, said part of Lot Sixty-seven (67) described as follows: Beginning for the same at a point on the North line of Harvard Street, at the Southeast corner of said Lot Sixty-seven (67), and running thence West along said line of Harvard Street, to a point on said line of Harvard Street which would be the point of intersection of a prolongation along the center line of the East wall of premises No. 1409 Harvard Street, with the said North line of said Harvard Street; thence North along said prolongation and through the center of said East wall and along a prolongation Northward of said center line of said East wall to the rear line of said Lot Sixty-seven (67); thence East along said rear line of said Lot Sixty-seven (67) to the Northeast corner of said lot; and thence South along the East line of said lot, to the place of beginning.

Together with a right of way over and across the rear Five (5) feet of the remaining part of Lot Sixty-seven (67) and over and across the rear Five (5) feet of Lot Sixty-four (64) in said square, for a means of ingress and egress for the use and benefit of said Lot Sixty-six (66) and the above described part of Lot Sixty-seven (67).

with the improvements thereon, including stores and an apartment house known as 2900 Fourteenth Street, Northwest, assessed for taxation purposes as Lots 66 and 831, in Square 2670, which deed of trust was duly recorded on December 13th, 1927, in Liber 6036, folio 37 *et seq.*, of the

Land Records of the District of Columbia. Said deed of trust is hereinafter described as the "first deed of trust" and all of the conveyances hereinafter described were duly recorded among the Land Records of the District of Columbia in the Libers indicated in parentheses.

3 4. On October 15, 1928, said Prince, and his wife, conveyed said property by deed, subject to said first deed of trust, to the D. C. Realty Company, Inc., (Liber 6240, folio 158). On October 23, 1928, said D. C. Realty Company, Inc., executed and delivered a second deed of trust covering said property to Frank P. Harmon and B. Ashby Leavell, Trustees, to secure payment of an indebtedness of \$90,000 due from said D. C. Realty Company, Inc., to the Merchants Bank and Trust Company, a corporation, (Liber 6265, folio 423). Thereafter said property was sold under said second deed of trust and B. Ashby Leavell having died, said property was conveyed, subject to said first deed of trust, by Frank P. Harmon, Jr., as surviving Trustee, to Merchants Bank and Trust Company by Trustee's deed, dated August 19, 1930, (Liber 6476, folio 335).

5. By deed dated November 1, 1930, the Merchants Bank and Trust Company made a general conveyance of all of its property to the Federal American National Bank and Trust Company (Liber 6500, folio 291) and by deed dated January 29, 1931, said Merchants Bank conveyed certain specific real estate, including the real estate described in Paragraph 3 hereof, to the Federal American National Bank and Trust Company (Liber 6524, folio 275).

6. By deed dated February 2, 1931, the Federal American National Bank and Trust Company conveyed said property to Glen M. McCambridge and L. Emmart Meany, Trustees, (Liber 6525, folio 204), and on February 4, 1931, said McCambridge and Meany, Trustees, and plaintiff executed agreements extending the maturity of all of said
4 notes to December 12th, 1933, with interest to continue at 5½% per annum, payable semi-annually, it being therein agreed that, in consideration of the extension of maturity, said notes and first deed of trust were ratified, confirmed and remained otherwise unqualified and in full force. By deed dated February 4, 1931, said property was reconveyed by said McCambridge and Meany, Trus-

tees, to said Federal American National Bank and Trust Company (Liber 6526, folio 84).

7. On or about March 6th, 1933, the Federal American National Bank and Trust Company was closed by Proclamation of the President of the United States and has not since reopened or continued in business as a bank or trust company. On or about March 14, 1933, John Poole was appointed Conservator of the property of said Federal American National Bank and Trust Company by the Acting Comptroller of the Currency, in accordance with the statute in such case provided.

8. By deed of trust dated August 21, 1933, hereinafter described as the "second deed of trust," John Poole, as such Conservator, conveyed certain property of said Federal American National Bank and Trust Company, including the real estate described in Paragraph 3 hereof, to Riggs National Bank of Washington, as Trustee, to secure payment of a loan of \$2,650,000 made by the defendant, Reconstruction Finance Corporation, to said Conservator (Liber 6749, folio 233).

9. On or about November 1, 1933, the defendant, Cary A. Hardee, was appointed by the defendant, James F. T. O'Connor, Comptroller of the Currency, to be the Receiver of all of the property of the Federal American National Bank and Trust Company, in accordance with the statute in such case provided, said Trust Company having become insolvent, and said Hardee, as such Receiver, has taken possession of and now holds and controls all of said property, including said real estate described in Paragraph 3 hereof, subject to the first deed of trust described in said Paragraph 3 and subject to the second deed of trust described in Paragraph 8 hereof.

10. On account of the principal of said notes aggregating \$125,000 described in Paragraph 3 hereof, \$5,000 was paid on February 5th, 1931; \$5,000 was paid on December 12th, 1931, and \$5,000 was paid on December 12th, 1932, or a total of \$15,000, leaving a balance of \$110,000 now remaining overdue and unpaid on the principal of said notes. Interest has been paid on said notes through December 12th, 1932, but no interest has been paid thereon since the date last mentioned, and taxes on the property have been overdue since March, 1933, and are still overdue and unpaid. Premiums on insurance have been paid by plaintiff

and defendant Hardee, although requested so to do, has wholly failed to reimburse plaintiff therefor. The total charges now overdue on said notes and under said first deed of trust are as follows:

1. Second half of 1933 real estate taxes, due March 31, 1933, with penalty of 9%, through December 31, 1933.....	\$1,515.10
2. First half of 1934 real estate taxes, due September 30, 1933, with penalty of 3%, through December 31, 1933.....	1,112.98
3. Interest for one year, beginning December 13, 1932, until December 12, 1933, on loan of \$110,000.00, at 5½%.....	6,050.00
4. Fire Insurance premium on \$80,000.00 policy, for three years, commencing December 8, 1933.....	680.00
5. Principal sum, totalling \$110,000.00, due December 12, 1933.....	110,000.00
Total overdue charges.....	\$119,358.08

11. Plaintiff is informed and believes and therefore avers that the gross rentals from said property aggregate about \$1,355.00 per month, when all space is rented, and the net rentals, above operating expenses, actually collected by Shannon & Luchs, Inc., as agents for John Poole, Conservator, from March 14th to September 30th, 1933, amounted to \$5,357.12; the net rentals collected by Shannon & Luchs, Inc., as agents for said Conservator for the month of October, 1933, amounted to \$731.13, and the net rentals collected by Shannon & Luchs, Inc., as agents for said Receiver, for the month of November, 1933, amounted to \$195.15. The total net rentals so collected, amounting to \$6,283.40, have been deposited to the credit of and are now in the possession or under the control of defendant O'Connor as Comptroller of the Currency, and, plaintiff is informed and believes and therefore avers that said sum of money has been earmarked and identified as the net income received from said property. Plaintiff is also informed and believes, and therefore, avers that during the present month of December, 1933, Shannon & Luchs, Inc., as agents of said Receiver, are continuing to

collect and have in their possession additional rentals derived from said property.

12. Under said first deed of trust, Leslie E. F. Prince, owner of the property, to whose title and legal responsibilities the defendant Hardee, as Receiver, has succeeded as above stated, agreed to pay said indebtedness, said taxes on the property and fire insurance premiums when due and it was agreed that the owner should receive the rents, issues and profits from said property *until default* in the indebtedness thereby secured, but upon default in the payment of such indebtedness, or any interest thereon when due, or upon default in the payment of taxes and insurance premiums when due, the Trustee named in said deed of trust was authorized and empowered to sell said property at public auction and apply the proceeds of sale in satisfaction of said indebtedness, interest, taxes, insurance premiums and other costs and expenses as therein more fully set forth.

7 13. There have been defaults in the payment of taxes since March 31, 1933, and in the payment of interest since June 12th, 1933, and in the payment of principal and insurance premiums as set forth in Paragraph 10 above, and frequent demands have been made upon said Conservator and Receiver to make good said defaults and to apply said net rentals to the payment of taxes and interest on said indebtedness. Under date of October 21st, 1933, plaintiff's counsel wrote to said Conservator demanding that said net rentals be so applied and under date of November 24th, 1933, plaintiff's counsel wrote to said Receiver making a similar demand. Said Conservator and Receiver have replied that such demands have been submitted to the Comptroller of the Currency for instructions and no decision has been made by said Comptroller with respect thereto.

14. Plaintiff now intends to request the Trustee named in said first deed of trust to sell said property under the terms thereof, but it will be necessary to advertise the sale for a reasonable period of time, as it appears to be inadvisable to make such sale during the Christmas holidays, and in the meantime said Receiver through his agents will continue to collect the rent for December, 1933, and January, 1934, and said Receiver has refused to give plaintiff any assurance that the net rents will be applied to the

payment of taxes and on account of said overdue interest. Plaintiff has no means of obtaining payment of said overdue charges except by the aid of this Court against said real estate and said fund resulting from net rentals.

Wherefore, in consideration of the premises, plaintiff prays:

1. That a writ of subpoena be issued and served upon each of said defendants, requiring them, and each of them, to answer the exigencies of this bill;

8 2. That a rule be issued and served upon said defendants, and each of them, to show cause, if any they have, why a Receiver should not be appointed to take possession of and manage the property described in Paragraph 3 hereof; to collect the rents and income thereof and, after paying operating expenses, to apply the net rents to the payment of said overdue taxes, insurance premiums, interest on said indebtedness and the balance, if any, to the principal of said indebtedness, and to show cause why said fund of \$6,283.40, consisting of net rents deposited to the credit of the Comptroller of the Currency, should not be similarly applied, or turned over and delivered to the Receiver so appointed herein, to be applied as directed by this Court;

3. That leave be given, if such leave is necessary, to plaintiff and to the Trustee named in said first deed of trust, to foreclose and sell said property under the terms of said first deed of trust;

4. And for such other and further relief, as the Court may deem proper.

[CORPORATE SEAL.] AMERICAN SECURITY AND
TRUST COMPANY,

By WM. L. BEALE,

Vice-President,

Plaintiff.

McKENNEY, FLANNERY & CRAIGHILL,

By G. B. CRAIGHILL,

Attorneys for Plaintiff.

DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I have read the foregoing bill of complaint by me subscribed as Vice President of the

American Security and Trust Company, plaintiff, and I know the contents thereof; that the facts therein stated of my personal knowledge are true and those stated upon information and belief, I believe to be true.

WM. L. BEALE.

Subscribed and sworn to before me this 21st day of December, 1933.

[SEAL.]

HARRY G. MULLER,
Notary Public, D. C.

My commission expires March 30, 1934.

Rule to Show Cause.

Filed December 22, 1933.

* * * * *

Upon consideration of the bill of complaint filed by the American Security and Trust Company, plaintiff, in the above entitled cause, it is by the Court this 22d day of December, 1933,

Ordered that the defendants, (1) Cary A. Hardee, Receiver of the Federal American National Bank and Trust Company, (2) James F. T. O'Connor, Comptroller of the Currency, and the (3) Reconstruction Finance Corporation, and each of them, show cause, if any they have, on or before January 5, 1934, why a Receiver should not be appointed to take possession of and manage the real estate described in said bill, to collect the rents and income therefrom and, after paying operating expenses, to apply the net rents to the payment of overdue taxes, insurance premiums, interest on the indebtedness secured by first deed of trust on said property and the balance, if any, to the overdue principal of said indebtedness, and to show cause why the fund of \$6,283.40, alleged to be net rents derived from said property and deposited to the credit of the Comptroller of the Currency, should not be similarly applied, or turned over and delivered to the Receiver, who may be appointed herein, to be applied as directed by this Court, *provided* a copy of said bill and of this rule shall have been served upon said defendants on or before

10

F. D. LETTS,
Justice.

Marshal's Returns.

Served a copy of the above rule & bill on Cary A. Hardee, Receiver Federal American National Bank & Trust Co., by John A. Riley, act. & Asst. Receiver personally. 12-26-33.

EDGAR C. SNYDER,

*U. S. Marshal in and for
the Dist. of Columbia,*

By H. C. ALLEN,
B.,

Deputy U. S. Marshal.

Served a copy of the above rule & bill on James F. T. O'Connor, Comptroller of the Currency, by Gibbs Lyons, Deputy Comptroller, personally. 12-22-33.

EDGAR C. SNYDER,

*U. S. Marshal in and for
the Dist. of Columbia,*

By H. C. ALLEN,
B.,

Deputy U. S. Marshal.

Served a copy of the above rule & bill on Reconstruction Finance Corporation, by George R. Cooksey, Secretary, personally. 12-29-33.

EDGAR C. SNYDER,

*U. S. Marshal in and for
the Dist. of Columbia,*

By W. P. HAYS,
B.,

Deputy U. S. Marshal.

Answer to Plaintiff's Rule to Show Cause.

Filed January 13, 1934.

* * * * *

Comes now the defendant, Cary A. Hardee, receiver of the Federal-American National Bank and Trust Company, a corporation, and for an answer to the rule herein issued on the 22nd day of December, 1933, *and* says that the plaintiff is not entitled to have a receiver appointed to take possession of the real estate described in his bill of complaint,

or to act in any of the other matters particularly enumerated in the said rule to show cause for the following reasons:

The defendant, Cary A. Hardee, avers as follows:

1. There is no waste being committed upon these premises and the plaintiff does not so allege.

2. There is no impairment of security that will result from the failure to appoint a receiver, and the plaintiff does not allege that any impairment of security will result, or is anticipated.

3. The plaintiff has not called upon the trustee to exercise the power of sale under the deed of trust, upon default, if any such default has occurred, and alleges that the appointment of a receiver is desired in order to carry on the business for an indefinite period of time, until it sees fit to sell.

4. The deed of trust, so defendant is informed, advised and believes, and so believing avers, contains no provision for the appointment of a receiver upon default, and the plaintiff does not so allege.

5. The defendant has no information as to whether or not the security is adequate security for the debt, which the plaintiff alleges to be due, and plaintiff does not allege that the security is not adequate for the debt.

6. The deed of trust covered only the land described in paragraph 3 of the plaintiff's bill, and did not cover the rents, issues and profits from the enjoyment thereof, and the plaintiff's bill does not allege that the deed of trust did convey the said rents, issues and profits from the land, either before or after default.

7. That defendant is in lawful possession of the premises described in paragraph 3 of the plaintiff's bill, and is there- entitled to the rents, issues and profits therefrom, to the exclusion of the plaintiff.

8. That the deed of trust did not create any lien on the rents, issues and profits arising from the use or occupancy of the premises described in paragraph 3 of the plaintiff's bill, and the plaintiff does not aver that the deed of trust did create any such lien.

9. Upon information and belief defendant avers that no considerable loss or damage will result to mortgagee pending sale under the deed of trust, if it be that default has occurred thereunder, and the plaintiff

does not allege that the appointment of a receiver is necessary to save it from loss or damage, or that it will suffer a loss or damage, if a receiver be not appointed.

10. Upon information and belief the defendant avers that the plaintiff is not entitled to the rents, issues and profits from the said property heretofore collected, which the plaintiff avers to be the sum of \$6,283.40; not to any other rents which may hereafter be collected, pending such time as the plaintiff shall lawfully take possession of the said property.

Wherefore, having fully answered the said rule, the defendant prays that the same be now discharged and that he be permitted to go hence without day.

CARY A. HARDEE,
*Receiver, Federal-American National
Bank and Trust Company.*

DISTRICT OF COLUMBIA, ss:

I, Cary A. Hardee, being first duly sworn, on oath depose and say that I am the receiver for the Federal-American National Bank and Trust Company and in such capacity am one of the defendants in the above suit; that I have read the annexed answer to plaintiff's rule to show cause and know the contents thereof; that the statements therein made as of my knowledge I know to be true; and those made upon information and belief, I believe to be true.

CARY A. HARDEE.

13 Subscribed and sworn to before me this 12th day
 of January, 1934.

[SEAL.]

JOHN F. GUTHRIDGE,
Notary Public for D. C.

HUSTON THOMPSON,
HERBERT S. WARD,
Attorneys for Cary A. Hardee.

Motion to Dismiss Bill, &c.

Filed January 13, 1934.

* * * * *

Comes now the defendant, Cary A. Hardee, Receiver of the Federal American National Bank and Trust Company,

defendant in the above entitled cause, and moves to dismiss the bill of complaint for the following reasons:

1. The bill is without Equity.
2. Plaintiff has a full, adequate and complete remedy at law.
3. Plaintiff has made out no grounds for the appointment of a Receiver.
4. Plaintiff shows that it has not exercised or attempted to exercise its legal rights in the premises.
5. The bill is bad for uncertainty.
6. And for other reasons apparent upon the face of the record.

HUSTON THOMPSON,
HERBERT S. WARD,
Attorneys for Defendants.

CHARLES E. WAINWRIGHT,
Attorney for Defendant,
James F. T. O'Connor.

14 *Order Giving Leave to Plaintiff to File Amended and Supplemental Bill, &c.*

Filed March 2, 1934.

* * * * *

Upon motion of counsel for the plaintiff in the above entitled cause, it is by the Court this 2nd day of March, 1934,

Ordered that leave be and it is hereby given to plaintiff to file an amended and supplemental bill of complaint herein on or before April 5, 1934, the rule issued herein on December 22, 1933, is discharged and defendant's motion to dismiss original bill is granted, without prejudice.

DANIEL W. O'DONOGHUE,
Justice.

No objection.

HUSTON THOMPSON,
HERBERT S. WARD,
Att'ys. for Cary A. Hardee,
Receiver Fed. Am. Nat'l Bk. & Tr. Co.

Amended and Supplemental Bill of Complaint.

Filed April 4, 1934.

* * * * *

With leave of Court granted by order entered herein on March 2, 1934, the plaintiff, American Security and Trust

Company, files this amended and supplemental bill of complaint and respectfully represents unto the Court as follows:

1. Plaintiff is a corporation duly organized and existing under the laws of the United States in force in the District of Columbia and brings this suit in its own right as owner of the secured notes hereinafter described.

2. Defendant Cary A. Hardee is a citizen of the United States temporarily residing in the District of Columbia and he is sued as Receiver of the Federal American National Bank and Trust Company, a corporation. De-

15 defendant James F. T. O'Connor is a citizen of the United States temporarily residing in the District of Columbia and he is sued as Comptroller of the Currency. In view of developments since the filing of the original bill, said bill was finally dismissed as to the defendant, Reconstruction Finance Corporation, by a separate order entered herein on March 2, 1934, the interest of said Corporation in a junior lien on the property having been displaced by the sale hereinafter described.

3. On December 12th, 1927, plaintiff loaned Leslie E. F. Prince the sum of one hundred and twenty-five thousand dollars (\$125,000.00) for which he executed and delivered to plaintiff thirty-five promissory notes, dated December 12th, 1927, payable to the order of plaintiff three (3) years after said date, notes Nos. 1 to 10, inclusive, being for \$2,500 each, Nos. 11 to 20, inclusive, being for \$3,000 each, Nos. 21 to 25, inclusive, being for \$4,000 each and Nos. 26 to 35, inclusive, being for \$5,000 each, each of said notes bearing interest at the rate of $5\frac{1}{2}\%$ per annum, payable semi-annually, and to secure prompt payment of the principal of and interest upon said notes, said Leslie E. F. Prince and Helen B. Prince, his wife, on the same date, executed and delivered a deed of trust, in the usual form, to National Savings and Trust Company, a corporation, as Trustee, covering the following real property in the District of Columbia:

Lot Sixty-six (66) and part of Lot Sixty-seven (67) in Harry Wardman and Harry B. Willson's Subdivision of lots in Block Thirty-nine (39) of "North Grounds of Columbian College", as per plat recorded in Liber County No. 22 folio 72 of the records of the Office of the Surveyor

of the District of Columbia, said part of Lot Sixty-seven (67) described as follows: Beginning for the same at a point on the North line of Harvard Street, at the Southeast corner of said Lot Sixty-seven (67), and running thence West along said line of Harvard Street, to a point on said line of Harvard Street which would be the point of intersection of a prolongation along the center line of the East Wall of premises No. 1409 Harvard Street, with the said North line of said Harvard Street; thence North
16 along said prolongation and through the center of said East wall and along a prolongation Northward of said center line of said East wall to the rear line of said Lot Sixty-seven (67); thence East along said rear line of said Lot Sixty-seven (67) to the Northeast corner of said lot; and thence South along the East line of said lot, to the place of beginning.

Together with a right of way over and across the rear Five (5) feet of the remaining part of Lot Sixty-seven (67) and over and across the rear Five (5) feet of Lot Sixty-four (64) in said square, for a means of ingress and egress for the use and benefit of said Lot Sixty-six (66) and the above described part of Lot Sixty-seven (67).

with the improvements thereon, including stores and an apartment house known as 2900 Fourteenth Street, Northwest, assessed for taxation purposes as Lots 66 and 831, in Square 2670, which deed of trust was duly recorded on December 13th, 1927, in Liber 6036, folio 37 *et seq.*, of the Land Records of the District of Columbia, and a true copy of said deed of trust is hereto attached marked "Exhibit A" and prayed to be read as a part hereof. Said deed of trust is hereinafter described as the "first deed of trust" and all of the conveyances hereinafter described were duly recorded among the Land Records of the District of Columbia in the Libers indicated in parentheses.

4. On October 15, 1928, said Prince, and his wife, conveyed said property by deed, subject to said first deed of trust, to the D. C. Realty Company, Inc., (Liber 6240, folio 158). On October 23, 1928, said D. C. Realty Company, Inc., executed and delivered a second deed of trust covering said property to Frank P. Harmon and B. Ashby Leavell, Trustees, to secure payment of an indebtedness of

\$90,000 due from said D. C. Realty Company, Inc., to the Merchants Bank and Trust Company, a corporation, (Liber 6265, folio 423). Thereafter said property was sold under said second deed of trust and B. Ashby Leavell having died, said property was conveyed, subject to said first deed of trust, by Frank P. Harmon, Jr., as surviving Trustee, to Merchants Bank and Trust Company by Trustee's
17 deed, dated August 19, 1930 (Liber 6476, folio 335).

5. By deed dated November 1, 1930, the Merchants Bank and Trust Company made a general conveyance of all of its property to the Federal American National Bank and Trust Company (Liber 6500, folio 291) and by deed dated January 29, 1931, said Merchants Bank conveyed certain specific real estate, including the real estate described in Paragraph 3 hereof, to the Federal American National Bank and Trust Company (Liber 6524, folio 275).

6. By deed dated February 2, 1931, the Federal American National Bank and Trust Company conveyed said property to Glen M. McCambridge and L. Emmart Meany, Trustees, (Liber 6525, folio 204), and on February 4, 1931, said McCambridge and Meany, Trustees, and plaintiff executed agreements extending the maturity of all of said notes to December 12th, 1933, with interest to continue at 5½% per annum, payable semi-annually, it being therein agreed that, in consideration of the extension of maturity, said notes and first deed of trust were ratified, confirmed and remained otherwise unqualified and in full force. By deed dated February 4, 1931, said property was reconveyed by said McCambridge and Meany, Trustees, to said Federal American National Bank and Trust Company (Liber 6526, folio 84).

7. On or about March 6th, 1933, the Federal American National Bank and Trust Company was closed by Proclamation of the President of the United States and has not since reopened or continued in business as a bank or trust company. On or about March 14, 1933, John Poole was appointed Conservator of the property of said Federal American National Bank and Trust Company by the Acting Comptroller of the Currency, in accordance with the statute in such case provided.

8. On or about November 1, 1933, the defendant, Cary A. Hardee, was appointed by the defendant, James F. T.

18 O'Connor, Comptroller of the Currency, to be the Receiver of all of the property of the Federal American National Bank and Trust Company, in accordance with the statute in such case provided. The Federal American National Bank and Trust Company having become insolvent, said Poole, Conservator, upon his appointment on March 14, 1933, and said Hardee, Receiver, upon his appointment on November 1, 1933, took possession of all of said property, including the real estate described in Paragraph 3 hereof, and collected the rents therefrom, as hereinafter stated.

9. On account of the principal of said notes aggregating \$125,000 described in Paragraph 3 hereof, \$5,000 was paid on February 5th, 1931; \$5,000 was paid on December 12th, 1931, and \$5,000 was paid on December 12th, 1932, or a total of \$15,000, leaving a balance of \$110,000 unpaid on principal.

10. Plaintiff is informed, believes and therefore avers that from the time when the Federal American Bank and Trust Company acquired the property in 1930 until March 14, 1933, it collected the gross rents from the property, which amounted to about \$1355 per month, when all space was rented, and out of the rents so received, paid operating expenses and paid interest on said first trust notes through December 12, 1932, and taxes on the property through December 31, 1932, but made no payment on account of interest and taxes accruing subsequently thereto. While said Poole, Conservator, was in possession of the property from March 14th to October 31, 1933, and while Hardee, Receiver, was in possession of the property from November 1, 1933, to January 30, 1934, they collected the gross rents, through agents, paid operating expenses therefrom and deposited the net rents, which plaintiff is informed and believes aggregated \$6,858.26, with the Treasurer of the United States subject to the order of the defendant, O'Connor, as Comptroller of the Currency, but during said period from March 14, 1933, to January 30, 1934, said Poole, Conservator, and Hardee, Receiver, paid nothing on account of taxes due on said property and nothing on
19 account of interest on said first trust notes.

11. Default having occurred in the payment of taxes due March 31, 1933, and subsequently, and in the semi-annual interest due June 12th, 1933, and subsequently, and in the

entire balance of principal in the sum of \$110,000 due December 12th, 1933, plaintiff filed its original bill herein on December 16, 1933, praying for the appointment of a Receiver to collect the rents and to have such rents, together with the net rents theretofore collected, applied on said overdue taxes, interest and principal, and praying for other relief. A rule was issued thereon requiring defendants to show cause why the prayers of the bill should not be granted, whereupon defendant Hardee filed a motion to dismiss the bill and discharge the rule upon the ground, among others, that plaintiff had an adequate remedy by foreclosure sale under the deed of trust.

12. Plaintiff thereupon had the property advertised for sale under the deed of trust and it was sold thereunder on January 30, 1934, to plaintiff for \$85,000, leaving a deficiency of \$35,532.26 due plaintiff on account of said notes, taxes and insurance premiums advanced, as shown by a settlement statement of the National Savings and Trust Company, Trustee, a true copy of which is hereto attached marked Exhibit B and prayed to be read as part hereof. Plaintiff thereupon took possession of the property on or about January 31, 1934, and thereafter paid the taxes overdue on said property.

13. When this cause came on for hearing on said Hardee's motion to dismiss the original bill and discharge the rule, plaintiff informed the court of said sale and of the fact that it was no longer necessary to have a Receiver appointed for the property. The Court thereupon entered an order on March 2, 1934, dismissing the original
20 bill and discharging the rule, without prejudice and with leave to plaintiff to file this amended and supplemental bill.

14. Under said first deed of trust, Leslie E. F. Prince, owner of the property, to whose title and legal responsibilities the defendant Hardee, as Receiver, has succeeded in the manner above stated, agreed to pay said indebtedness, said taxes and fire insurance premiums when due, and it was agreed therein that the owner should receive the rents, issues and profits from said property *until default* in the indebtedness thereby secured, but upon default in the payment of such indebtedness, or of any interest thereon when due, or upon default in the payment of taxes and insurance premiums when due, the Trustee named in said deed of

trust was authorized and empowered to sell said property at public auction and apply the proceeds of sale in satisfaction of said indebtedness, interest, taxes, insurance premiums and other costs and expenses as therein more fully set forth.

15. When the first default occurred in the payment of taxes due March 31, 1933, said property was already in the possession of said Poole, Conservator, and, in an effort to cooperate with said Conservator and later with said Receiver in the orderly administration of the assets of said insolvent banking corporation, plaintiff refrained from making an immediate sale of said property under said first deed of trust, but claimed that, *after said defaults*, plaintiff was entitled to have said net rents applied on said overdue taxes and interest, and plaintiff made oral and written demands upon said Conservator and Receiver to have said net rents so applied, but said Conservator and Receiver merely replied that such demands had been submitted to the Comptroller of the Currency for instructions and no

21 decision had been received from said Comptroller with respect thereto prior to the filing of this suit.

16. Defendant Hardee, Receiver, is now engaged in liquidating the assets of said insolvent banking association, for the purpose of paying just claims of preferred and general creditors, including depositors, and paying the balance, if any, to the stockholders, as provided by statute, and plaintiff is advised and, therefore, charges that plaintiff has a preferred right, in equity, to said net rents superior to the claim of the general creditors of said insolvent banking association, and that, under the circumstances above described, it would be inequitable and unjust to permit said Receiver to retain said net rents, amounting to \$6,858.26, for the benefit of general creditors and not pay said preferred claims for said taxes amounting to \$2,834.10 and interest amounting to \$6,873.46, which accrued on said first trust notes; that said Receiver took possession of said property and the benefits flowing therefrom subject to concomitant obligations, including not only the obligation to pay ordinary operating expenses of said property but also the interest and taxes which accrued while the Receiver and Conservator were in possession.

17. Plaintiff is informed and believes and therefore charges that payment of said interest on said first trust

notes and taxes can not now be enforced against said Leslie E. F. Prince, or against McCambridge and Meany, Trustees, and that said Trustees were merely "straw parties" to whom title to the property was conveyed by said Federal American Bank and Trust Company for only two days, as described in Paragraph 6 hereof, in an effort on the part of said institution to avoid responsibility for payment of said notes, and interest thereon, and plaintiff, therefore, has no adequate remedy at law.

Wherefore, in consideration of the premises, plaintiff prays:

22 1. That writs of subpoena be issued and served upon the defendants, Cary A. Hardee, Receiver, and James F. T. O'Connor, Comptroller of the Currency, requiring them, and each of them, to answer the exigencies of this bill;

2. That a rule be issued and served upon said defendants, and each of them, to show cause, if any they have, why the net rents, in the sum of, to wit, \$6,858.26, collected by said Conservator and Receiver from March 14, 1933, to January 30, 1934, from the property above described, should not be paid to plaintiff, first, to reimburse plaintiff for overdue taxes in the sum of \$2,834.10, paid by plaintiff on said property subsequently to said foreclosure sale, and second, to be applied on account of interest in the sum of \$6,873.46 overdue on said first trust notes;

3. And for such other and further relief, as the Court may deem proper.

AMERICAN SECURITY AND
TRUST COMPANY,

By WM. L. BEALE,

Vice President, Plaintiff.

McKENNEY, FLANNERY & CRAIGHILL,

By G. B. CRAIGHILL,

Attorneys for Plaintiff.

DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I have read the foregoing amended and supplemental bill of complaint by me subscribed as Vice President of the American Security and Trust Company, plaintiff, and I know the contents thereof;

that the facts therein stated of my personal knowledge are true and those stated upon information and belief, I believe to be true.

WM. L. BEALE.

23 Subscribed and sworn to before me this 4th day
 of April, 1934.

[SEAL.]

LINNAEUS T. SAVAGE,
Notary Public D. C.

My Commission Expires Dec. 13, 1935.

EXHIBIT A.

This deed of trust Made this 12th day of December, in the year Nineteen hundred and Twenty-seven by and between Leslie E. F. Prince and Helen B. Prince, his wife, of the District of Columbia, parties hereto of the first part; and the National Savings and Trust Company, a corporation in the said District, party hereto of the second part;

Whereas, the said Leslie E. F. Prince is justly indebted unto the American Security and Trust Company in the full sum of One hundred and twenty-five thousand Dollars (\$125,000) for money loaned, for which he has executed and delivered his thirty-five certain promissory notes bearing even date with these presents, numbered 1 to 35 respectively, notes Nos. 1 to 10 inclusive, for the sum of Twenty-five hundred Dollars (\$2,500) each, notes Nos. 11 to 20 both inclusive, for the sum of Three thousand Dollars (\$3,000) each, notes Nos. 21 to 25 both inclusive, for the sum of Four thousand Dollars (\$4,000) each and notes Nos. 26 to 35 both inclusive, for the sum of Five thousand Dollars (\$5,000) each, all of said notes payable to order of the said American Security and Trust Company three years after date, with interest thereon from date and until paid, at the rate of five and one-half per centum per annum, payable semi-annually—each instalment of interest to bear interest after maturity, if not then paid, at the rate aforesaid.

24 Principal and interest payable at the office of said
 American Security and Trust Company, Washington, D. C.

Said notes have been identified by The Real Estate Title Insurance Company and The Columbia Title Insurance

Company, as evidenced by their certificate on each of said notes.

And Whereas, the parties hereto of the first part desire to secure the full and punctual payment of said debt and interest thereon, as well as any and all renewals or extensions of said notes, or any part thereof, with interest on such renewals or extensions, at such rate of interest as may be agreed upon, and any notes given for interest covering any extension, with interest thereon from maturity of the same (which renewals or extensions of the debt or any part thereof, hereby secured, or any change in its terms or rate of interest payable on same, shall not impair in any manner the validity of, or priority of this Trust); and also to secure the reimbursement to the holder or holders of said notes and to the party hereto of the second part, its successors, or substituted Trustee, and any purchaser or purchasers, grantee or grantees under any sale or sales under the provisions of this Trust, for all money which may be advanced as herein provided for, and for any and all costs and expenses (including reasonable counsel fees) incurred or paid on account of any litigation at law or in equity, which may arise in respect to this Trust, or to the indebtedness or to the property herein mentioned, or in obtaining possession of the premises after any sale which may be made as hereinafter provided for.

Now, therefore, this deed of trust witnesseth, that the parties hereto of the first part, in consideration of the premises, and of One Dollar in lawful money, do grant and convey unto the party hereto of the second part, in fee simple, the following-described land and premises; with the im-

25 improvements, easements, rights, ways and appurtenances thereunto belonging, situate and lying in the District of Columbia, namely:

Lot Sixty-six (66) and part of Lot Sixty-seven (67) in Harry Wardman and Harry B. Willson's Subdivision of lots in Block Thirty-nine (39) of "North Grounds of Columbian College," as per plat recorded in Liber County No. 22 folio 72 of the Records of the Office of the Surveyor of the District of Columbia, said part of Lot Sixty-seven (67) described as follows: Beginning for the same at a point on the North line of Harvard Street, at the Southeast corner of said Lot Sixty-seven (67), and running thence West along said line of Harvard Street, to a point on said

line of Harvard Street which would be the point of intersection of a prolongation along the center line of the East wall of premises No. 1409 Harvard Street, with the said North line of said Harvard Street; thence North along said prolongation and through the center of said East wall and along a prolongation Northward of said center line of said East wall to the rear line of said Lot Sixty-seven (67); thence East along said rear line of said Lot Sixty-seven (67) to the Northeast corner of said lot; and thence South along the East line of said lot, to the place of beginning.

Together with a right of way over and across the rear Five (5) feet of the remaining part of Lot Sixty-seven (67) and over and across the rear Five (5) feet of Lot Sixty-four (64) in said square, for a means of ingress and egress for the use and benefit of said Lot Sixty-six (66) and the above described part of Lot Sixty-seven (67).

In and upon the uses and trusts following, that is to say:

First. Until any default in payment of any matter of indebtedness hereby secured as herein provided for, to permit the said Leslie E. F. Prince, his heirs and assigns
26 to possess and enjoy said described premises, and to receive the rents, issues and profits thereof; and on full payment of said notes, and of any extensions or renewals thereof, and interest thereon, and all sums advanced or expended as herein provided, and all other proper costs, charges, expenses, commissions, and half commissions, at any time before the sale hereinafter provided for, to release and reconvey unto and at the cost of the said Leslie E. F. Prince or the party or parties then claiming under him—the aforesaid land and premises.

Second. Upon any default being made in payment of any one of said notes or of any instalment of principal or interest thereon, or on any renewal or extension thereof, or of any note or notes hereafter given for interest covering any extension, with interest thereon from maturity of the same, when and as the same shall become due and payable; or upon any default in payment, when due, of any tax or assessment, general or special, now or hereafter assessed against said land and premises, or any part thereof, while this Trust exists, or upon any default in keeping while this Trust exists, a fire insurance on the buildings on said land in an amount, in the name, and to the satisfaction of the

party hereto of the second part, who may select and designate the company or companies in which such insurance shall be placed, and who shall apply whatever may be received therefrom to the payment of the matters hereby secured, whether then due or not, unless the party entitled to receive the same shall waive the right to have the same so applied, or upon default in payment on demand, of any sum or sums advanced by the holder or holders of said notes on account of any costs and expenses of this Trust, or on account of any such tax or assessment or insurance, or expense of litigation, or on account of any lien, deed of trust, or mortgage, on said land and premises prior in

27 lien to this trust, with interest thereon at six per centum from date of advance (it being hereby agreed that on default in payment of said costs, expenses, tax or assessment, or insurance, or expense of litigation, or such prior lien, deed of trust or mortgage as aforesaid, the same may be paid by the holder or holders of said notes, and all sums advanced in so doing, with interest as aforesaid, shall forthwith attach as a lien hereunder and be demandable at any time); then upon any and every such default so made as aforesaid, the said party hereto of the second part, its successors or substituted Trustee shall sell the aforesaid land and premises and improvements at public auction, at such time and place, upon such terms and conditions and after such previous public notice, with such postponement of sale or resale, as to the said party hereto of the second part, its successors or substituted Trustee, shall seem best for the interest of all parties concerned; and (the terms of sale being complied with) shall convey in fee to and at the cost of the purchaser, the premises so sold, such purchaser being hereby discharged from all liability for the application of the purchase money; and shall apply the proceeds of sale (after paying all expenses of sale, all taxes and assessments, thereon due, all sums advanced as herein provided for, with interest as aforesaid, and a Trustee's commission of five per centum on the gross amount of sales), to the payment of the aforesaid indebtedness, or so much thereof as may then remain unpaid, whether then due or not, and the interest thereon to date of payment (it being agreed that the said notes shall, upon such sale being made before the maturity of said notes, or before the maturity of any renewal or extension thereof,

be and become immediately due and payable, at the election of the holder thereof), paying over the surplus if any, to the said Leslie E. F. Prince, his heirs or assigns upon the surrender and delivery to the purchaser, his, her or their heirs or assigns, of possession of the premises so
28 as aforesaid sold and conveyed, less the expense, if any, of obtaining possession thereof.

And the said Leslie E. F. Prince does hereby covenant that he will warrant specially the property hereby conveyed, and that he will execute such further assurances of said land as may be requisite, for vesting title in the said party hereto of the second part, for the uses and purposes, and upon the trusts hereinbefore declared: and will pay the aforesaid taxes and assessments and fire insurance premiums as the same become due and payable during the existence of this Trust, and while he is the owner of said land and premises.

And it is further covenanted and agreed that if the said property shall be advertised for sale, as hereinbefore provided, and not sold, the Trustee or Trustees acting shall be entitled to one-half of the commission above provided, to be computed on the amount of the debt hereby secured.

In testimony whereof, on the day and year first hereinabove written, the said parties hereto of the first part have hereunto set their hands and seals.

LESLIE E. F. PRINCE. [SEAL.]

HELEN B. PRINCE. [SEAL.]

Signed, sealed and delivered in the presence of:

— — —

DISTRICT OF COLUMBIA, *To wit:*

I, Harry J. Kane, Jr., a Notary Public in and for the said District, do hereby certify that Leslie E. F. Prince, and Helen B. Prince, his wife, parties to a certain Deed bearing date on the 12th day of December, A. D. 1927, and hereunto annexed, personally appeared before me in said

29 District, the said Leslie E. F. Prince and Helen B. Prince, his wife, being personally well known to me as the persons who executed the said Deed and acknowledged the same to be their act and deed.

Given under my hand and seal this 12th day of December, A. D. 1927.

[SEAL.]

HARRY J. KANE, JR.,
Notary Public.

EXHIBIT B.

Statement of National Savings and Trust Company, Trustee Under Deed of Trust Executed by Leslie E. F. Prince, Dated December 12, 1927, Recorded in Liber 6063 at Folio 37, Secured on Lots 66 and 831, Square 2670, Premises 2900, 04, 06, 08 Fourteenth Street and 1405 Harvard Street, Northwest.

Settlement date: January 30, 1934.

Because of default in the payment of the indebtedness secured, the above described property was on January 30, 1934, sold at public auction to American Security and Trust Company, for cash.....

\$85,000.00

Less:

Advertising..... \$119.70
Auctioneer's fee..... 25.00

Taxes:

Lot 831, Square 2670:

Redemption for 2nd half tax 1933..... \$14.25
Penalty..... .05
1st half 1934..... 9.92
Penalty..... .40
Accrued from 1/1/34 to 1/30/34..... 1.61

Lot 66, Square 2670:

Redemption for 2nd half tax 1933..... \$1,516.55
Penalty..... 5.06
1st half 1934..... 1,070.63
Penalty..... 42.83
Accrued from 1/1/34 to 1/30/34..... 172.80

2,834.10

Trustee's commission of 5% on \$85,000
waived.

Insurance premium..... 680.00

30

American Security & Trust Company: Interest at 5½% per annum from December 12, 1932 to January 30, 1934, on \$110,000 notes of Leslie E. F. Prince, dated December 12, 1927, secured on property foreclosed.....

6,873.46

Applied on account of principal..... 74,467.74

\$85,000.00 \$85,000.00

Principal sum..... \$110,000.00

Net amount as applied on account thereof 74,467.74

Deficiency..... \$35,532.26

With interest at 5½% from January 30, 1934 until paid.

NATIONAL SAVINGS AND TRUST
COMPANY,
Trustee.
By W. HILES PARDOE,
Assistant Treasurer.

Answer to Plaintiff's Rule to Show Cause.

Filed April 25, 1934.

* * * * *

Comes now the plaintiff, Cary A. Hardee, Receiver of the Federal-American National Bank and Trust Company, a corporation, and for an answer to the rule herein issued, says that the bill herein filed is without equity, and that the plaintiff is not entitled to the relief sought, either at law or in equity, for the following reasons:

1. He admits paragraph 1.

2. He admits paragraph 2.

3-4. Defendant is without knowledge as to the averments of paragraphs 3 and 4 and neither admits nor denies the same, but if material to his interests, demands strict proof.

5. He admits paragraph 5.

6. He admits paragraph 6.

31 7. He admits paragraph 7.

8. He admits paragraph 8.

9. Defendant has no knowledge of the facts, and neither admits nor denies the same, but if material to his interests, demands strict proof thereof.

10. Defendant admits that the Federal-American National Bank and Trust Company collected certain rents from the said real estate, and paid out of the same certain operating expenses, interest, taxes, and other charges. He is advised and believes and therefore admits that no interest or taxes was paid on the said property after March 4, 1933; also, that certain rents were collected, and expenses paid, and the net receipts amounting to about \$7,219.14 were reduced to possession and mingled with all other assets being administered by this defendant, and the Conservator, John Poole, and that such sums as were so received are now so commingled with the general assets of the bank and subject to distribution and disbursement in the same manner as all other assets of the said bank, and not otherwise.

11. He admits paragraph 11.

12. He admits that the property was advertised and sold on January 30, 1934, is without knowledge of the other aver-

ments of this paragraph and, if material to his interests, demands strict proof thereof.

13. He admits paragraph 13.

14. Defendant denies all of paragraph 14, except that, if material to his interests, he refers to the original deed of trust, a copy of which is set out as plaintiff's exhibit B, for greater certainty.

15. Defendant is without knowledge regarding the demands alleged to have been made upon John Poole, Conservator, or of the replies made thereto, and if material to his interests, he demands strict proof. He admits
32 that a demand was made upon him to turn over the net rents, denies that he submitted, or promised to submit the matter to the Comptroller of the Currency for instruction, or otherwise, and avers that he then and at all times since has declined and refused to make any payment out of the assets in his possession, for the reason that he is advised that to do so would be in violation of R. S. 5236, U. S. C. A., Title 12, Sec. 192, Page 294, and further, that he at all times insisted that the real estate be sold under the deed of trust.

16. Defendant admits that he is liquidating the affairs of the Federal-American National Bank and Trust Company. He denies all of the other allegations of paragraph 16.

17. Defendant has no knowledge regarding the averments of paragraph 17 and therefore denies the same and, if material to his interests, demands strict proof thereof.

Wherefore, having fully answered the plaintiff's rule to show cause, defendant prays that the rule be discharged, and that he be permitted to go hence without day, and to recover his costs.

CARY A. HARDEE,
*Receiver, Federal-American National
Bank and Trust Company.*

DISTRICT OF COLUMBIA, ss:

I, Cary A. Hardee, being first duly sworn, on oath depose and say that I have read the foregoing answer by me subscribed and know the contents thereof; that the matters and things therein stated as of my personal knowledge are

The Points and Authorities filed with the Motion of Cary A. Hardee are relied upon in support of this Motion.

JOHN F. ANDERSON,
Attorney for Comptroller of the Currency.

34 *Order Overruling Motions to Dismiss.*

Filed June 28, 1934.

* * * * *

Upon consideration of the motions of the defendants, Cary A. Hardee, Receiver, and James F. T. O'Connor, Comptroller of the Currency, to dismiss the amended and supplemental bill filed by the plaintiff in the above entitled cause, it is by the Court this 28th day of June, 1934,

Adjudged, ordered and decreed that said motions be and they are hereby severally denied.

DANIEL W. O'DONOGHUE,
Justice.

No objection as to form.

J. F. ANDERSON.
HUSTON THOMPSON.
HERBERT S. WARD.

Answer of Defendants and Stipulation.

Filed June 28, 1934.

* * * * *

It is hereby stipulated and agreed by and between counsel for the respective parties to the above entitled cause that the following facts are true and that this stipulation and defendants' returns to rule may be accepted by the Court in lieu of an answer by the defendants, Cary A. Hardee, Receiver, and James F. T. O'Connor, Comptroller:

1. The facts stated in Paragraphs Nos. 1 to 9, inclusive, of the plaintiff's amended and supplemental bill filed herein on April 4, 1934, are true and Exhibit A thereto attached is a true copy of the deed of trust therein described.

2. The facts stated in Paragraphs Nos. 11 to 13, inclusive, Paragraph 15 and Paragraph 17 of plaintiff's amended and supplemental bill are true, but defendants do
35 not admit the conclusion of law in Paragraph 17 that plaintiff has no adequate remedy at law.

3. The taxes which accrued on the property, with penalties, from March 14, 1933, to January 30, 1934, were as follows:

March 14, 1933, to June 30, 1933, at rate of \$2,780 per year, plus penalty	\$974.97
July 1, 1933, to December 31, 1933, at rate of \$2,161.10 per year, plus penalty	1,123.78
January 1, 1934, to January 30, 1934, at rate of \$2,161.10 per year	174.41
Total	\$2,273.16

4. The interest accrued from March 14, 1933, to January 30, 1934, on \$110,000, the amount of unpaid principal secured by said first deed of trust (Exhibit A), at 5½% per annum, amounted to \$5,455.00.

5. The gross rents collected from the property by the Conservator and Receiver after March 14, 1933, aggregated \$8,428.70 and the operating expenses, including janitor service, elevator, light, power, heat, and miscellaneous items of expense, amounted to \$3,165.93, so that the *net* amount collected by the Conservator and Receiver after March 14th, 1933, was \$5,262.77, and various sums representing rents collected and aggregating said sum of \$5,262.77, were deposited from time to time by the Conservator and Receiver, with other funds to their credit, with the Treasurer of the United States subject to the order of the Comptroller of the Currency.

6. The interest and taxes from March 14, 1933, to January 30, 1934, therefore, aggregated \$7,728.16, while the net rents collected during that period amounted to \$5,262.77.

McKENNEY, FLANNERY &
CRAIGHILL,
By G. B. CRAIGHILL,
Attorneys for Plaintiff.
HUSTON THOMPSON,
HERBERT S. WARD,
Attorneys for Defendant,
Cary A. Hardee, Receiver.
JOHN F. ANDERSON,
Attorney for Defendant,
John F. T. O'Connor, Comptroller.

Final Decree.

Filed June 28, 1934.

* * * * *

This cause came on to be heard at this term; and thereupon, upon consideration thereof, it is by the Court this 28th day of June, 1934,

Adjudged, ordered and decreed that the defendants, Cary A. Hardee, Receiver, and James F. T. O'Connor, Comptroller of the Currency, pay to the plaintiff the sum of \$5,262.77, representing the net rents collected by the Conservator and Receiver after March 14, 1933, from the real estate described in plaintiff's amended and supplemental bill of complaint, it appearing from the stipulation filed in the cause that the amount of said net rents is considerably less than the sum of the taxes and interest on the loan secured by first deed of trust on the property, accruing between March 14, 1933, and January 30, 1934, when the Receiver surrendered possession of said property to the purchaser thereof.

DANIEL W. O'DONOGHUE,
Justice.

Deft. Hardee excepts to entry of decree.

HUSTON THOMPSON.
HERBERT S. WARD.

Appeal noted in open Court, by Deft. Hardee, June 28, 1934.

DANIEL W. O'DONOGHUE,
Justice.

June 28, 1934.—Defendant O'Connor excepts to entry of decree and appeal noted in open court by defendant O'Connor.

DANIEL W. O'DONOGHUE,
Justice.

John F. Anderson, Atty.

No objection as to form.

J. F. ANDERSON.

37

Assignment of Errors.

Filed July 6, 1934.

* * * * *

Comes now Cary A. Hardee, Receiver of the Federal-American National Bank & Trust Company, the defendant in the above entitled cause and says:

1. That the Court erred in overruling defendant's motion to dismiss the amended bill.
2. That the Court erred in not dismissing the amended Bill of Complaint.
3. That the Court erred in not entering a final decree in favor of defendant.
4. That the Court erred in entering a final decree herein in favor of plaintiff.
5. That the Court erred in entering a decree awarding plaintiff the sum of \$5,262.77.
6. That the Court erred in entering a decree awarding plaintiff any sum of money.

HUSTON THOMPSON,
HERBERT S. WARD,

Attorneys for Defendant Cary A. Hardee.

Designation of Record.

Filed July 6, 1934.

* * * * *

The clerk will please prepare the record on appeal in the above entitled cause to contain the following:

1. The original bill of complaint.
2. The rule to show cause issued December 22, 1933.
3. Answer of Defendant Hardee to rule.
4. Motion of Defendant Hardee to dismiss bill.
- 38 5. Order of March 2, 1934, discharging rule, granting leave to plaintiff to file amended and supplemental bill.
6. The amended and supplemental bill filed by plaintiff.
7. Motion of Defendant Hardee to dismiss amended and supplemental bill of complaint.
8. Motion of defendant J. F. T. O'Connor to dismiss amended and supplemental bill of complaint.
9. Answer of Defendant Hardee filed April 25, 1934.
10. Answer of Defendant J. F. T. O'Connor filed April 17, 1934.

11. Order denying defendants' motions to dismiss.
12. Answer and stipulation filed herein.
13. Final decree.
14. Assignment of errors.
15. This designation of record.

NOTE.—This being an appeal by the United States, no deposit or security for costs is required.

HUSTON THOMPSON,
HERBERT S. WARD,

*Attorneys for Cary A. Hardee, Receiver, Federal-
American National Bank and Trust Co.*

39 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 38, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 56594 in Equity, wherein American Security and Trust Company, a corporation, is Plaintiff and Cary A. Hardee, Receiver, Federal American National Bank and Trust Company, a corporation, et al., are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 3rd day of August, 1934.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

APRIL TERM, 1934

No. 6282

**CARY A. HARDEE, RECEIVER OF THE FEDERAL-
AMERICAN NATIONAL BANK AND TRUST
COMPANY, A CORPORATION,
JAMES F. T. O'CONNOR, COMPTROLLER OF THE
CURRENCY,**

Appellants,

v.

**AMERICAN SECURITY AND TRUST COMPANY,
A CORPORATION,**

Appellee.

**Appeal from the Supreme Court of the District of
Columbia.**

BRIEF ON BEHALF OF APPELLANTS

HUSTON THOMPSON,
HERBERT S. WARD,
Attorneys for Appellant,

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

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CARY A. HARDEE, RECEIVER OF THE FEDERAL-
AMERICAN NATIONAL BANK AND TRUST
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Appellee.

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BRIEF ON BEHALF OF APPELLANTS

STATEMENT OF THE CASE

The American Security and Trust Company, plaintiffs below, hold notes of Leslie E. F. Prince, renewed February 2, 1931, by McCambridge and Meany, trustees, for the total sum of \$110,000.00, secured by a first deed of trust on No. 2900 Fourteenth Street, Northwest. On August 19, 1930, after sale under second deed of trust, the real estate was con-

veyed to the Merchants Bank and Trust Company, a corporation. On November 1, 1930, the Merchants Bank and Trust Company conveyed to the Federal-American National Bank and Trust Company, a corporation, the above premises. All conveyances were properly recorded, and the claim of title is not in question.

On March 6, 1933, possession and the legal title, subject to the first trust, was in the Federal-American National Bank and Trust Company.

On March 13, 1933, interest on \$110,000.00 first trust Prince note, six months at $5\frac{1}{2}\%$ per annum became due, and was not paid.

March 31, 1933, taxes on said real estate became due, and were not paid.

December 12, 1933, interest on \$110,000.00 Prince note, six months at $5\frac{1}{2}\%$ per annum became due, and was not paid.

December 8, 1933, fire insurance premiums became due, and were not paid.

December 12, 1933, the principal sum of \$110,000.00 became due, and was not paid.

March 6, 1933, the Federal-American National Bank and Trust Company was closed by proclamation of the President, declaring a Bank Holiday.

The Comptroller of the Currency, on March 14, 1933, appointed John Poole Conservator of the said bank.

On November 1, 1933, Cary A. Hardee was appointed and qualified as Receiver, and he thereupon took possession of the assets and records of the said bank. Both the Conservator and the Receiver collected the rents during the period of possession.

On January 30, 1934, the real estate was sold, under the first deed of trust, for \$85,000, leaving a deficiency on account of the unpaid principal of the Prince notes, interest, taxes, insurance and costs of sale of about \$35,000, and the Receiver immediately delivered possession of the premises.

The net rents collected by the Conservator and the Receiver, amounting to the sum of \$5,262.77, were deposited with the Comptroller of the Currency as required by law.

The taxes and penalties from March 14, 1933, to January 30, 1934, amounted to the sum of \$2,273.16; the interest during the same period amounted to the sum of \$5,455.00; a total of \$7,728.16.

The amended bill prayed for a decree, directing the defendants Hardee, Receiver, and O'Connor, Comptroller of the Currency, to pay over to the American Security and Trust Company the net rents collected between March 14, 1933, and January 30, 1934, to be applied first to taxes, and second to interest accruing during that period.

Defendant Hardee, Receiver, answered the rule, admitting a demand for the rents, and a refusal to make any payment out of the assets in his possession because such payment would be in violation of R. S. 5236, U. S. C. A., Title 12, Section 192, page 294.

Defendants also moved to dismiss the bill for the following reasons:

1. That the bill is without equity.
2. That the bill establishes no right to equitable relief.
3. And for other reasons apparent upon the face of the record.

On June 28, 1934, motions to dismiss were overruled. Defendants thereupon answered and stipulated that the rents aggregating \$5,262.77 were deposited by defendants from time to time with other funds to their credit, with the Treasurer of the United States, subject to the order of the Comptroller of the Currency.

On June 28, 1934, the Court entered a final decree that the defendants pay over to plaintiff the sum of \$5,262.77, representing net rents collected after March 14, 1933, to which both defendants duly excepted and noted appeal in open court.

THE LAW INVOLVED

On June 28, 1934, the lower Court entered a final decree ordering the Receiver of the Federal-American National Bank and Trust Company, appointed under the National Banking statutes by the Comptroller of the Currency, to distribute assets collected by him in violation of the specific provisions of the statutes.

The questions of law to be considered are as follows:

1. The Receiver of an insolvent National Bank must pay ratable dividends to creditors establishing claims. (*Barons First National Bank*, 28 Fed. (2), 615; *First National Bank of Selma v. Colvey*, 21 Wall., 609; *Scott v. Armstrong*, 146 U. S., 499; *Merrill v. National Bank*, 173 U. S., 131.) **He is an officer of the United States, not of any court.** (*Auten v. U. S. National Bank*, 178 U. S., 125; *Ex parte Chetwood*, 165 U. S., 443; *McDonald v. Nebraska*, 101 Fed. 171; *Schofield v. Palmer*, 134 Fed. 753; *Arm-*

strong v. Fantman, 36 Fed. 275; *Price v. Abbott*, 17 Fed. 506; *Platt v. Beach*, Fed. Cas. No. 11215; *Stanton v. Wilkeson*, D. 13299; *Hulse v. Arget Singer*, 12 Fed. 933; 12 U. S. C. A., Sec. 192, p. 280.) **He stands in place of the bank and takes the assets in trust for creditors.** (*Scott v. Armstrong*, 146 U. S., 499; *Hatch v. Johnson Loan, etc., Co.*, 79 Fed. 828; *Brown v. Schkier*, 112 Fed. 577; off 118 Fed. 981; off 194 U. S., 18; U. S. C. A. 12, p. 279, Note 41.)

2. Title R. S. 5236 furnishes a complete code for the distribution of the assets of an insolvent National Bank, and its provisions are not to be departed from. (*Cook Co. Nat'l Bank v. U. S.*, 107 U. S., 445; *Chicago First Nat'l Bank v. Selder*, 120 Fed. 212.) **The courts have no general advisory directing power over the liquidation of insolvent National Banks.** (*In re Earle*, 92 Fed. 22.)

3. A mortgagor in possession is entitled to take rents, issues and profits to his own use (*Willis v. Eastern Trust Co.*, 169 U. S., 295), **without liability to account to mortgagee for them. He takes rents free of any lien or claim thereon** (*Keyser v. Hitz*, 15 D. C., 179; *Eastern Trust Co. v. American Ice Co.*, 14 App. 304; *Willis v. Eastern Trust Co.*, 169 U. S., 295; *Freedman's Savings & Trust Co. v. Shepherd*, 127 U. S., 494; *Teal v. Walker*, 111 U. S., 2425; *Korntz v. Omaha Hotel Co.*, 107 U. S., 378; *Galveston, etc., R. Co. v. Cowdrey*, 11 Wall. 459), **and the creditors of bankrupt mortgagor, in possession, are entitled to rents accruing during occupancy.** (*Pennsylvania Steel Co. v. New York City R. R. Co.*, 231 Fed. 422.)

ASSIGNMENTS OF ERROR

The defendant, Cary A. Hardee, assigns as error:

1. That the Court erred in overruling defendant's motion to dismiss the amended bill.
2. That the Court erred in not dismissing the amended bill of complaint.
3. That the Court erred in not entering a final decree in favor of defendant.
4. That the Court erred in entering a final decree herein in favor of plaintiff.
5. That the Court erred in entering a decree, awarding plaintiff the sum of \$5,262.77.
6. That the Court erred in entering a decree, awarding plaintiff any sum of money.

ARGUMENT

The Federal-American National Bank and Trust Company was not liable on the Prince notes. The deed of trust did not convey rents, issues and profits, either before or after default. The appellant and his predecessor remained in possession during the entire period in controversy. The appellee (plaintiff below) has procured a decree, requiring the appellants to pay over the net rents collected during this period, to be applied to the payment of taxes and interest accruing during the same period. Plaintiff below does not contend that these rents constituted a trust fund, but averred that it would be inequitable and unjust "to permit general creditors to benefit from these rents and not apply them to preferred claims for interest and taxes." The deed of trust provides, among other things, that until default the trustees shall permit the mortgagor to possess and enjoy the

premises and receive the rents, issues and profits thereof—that upon default the trustees shall sell, etc.

I.

THE RECEIVER OF AN INSOLVENT NATIONAL BANK MUST PAY RATABLE DIVIDENDS TO CREDITORS ESTABLISHING CLAIMS.

The distribution of the assets of an insolvent National Bank is controlled by Section 5236 R. S., which reads as follows:

“From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver, on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction; and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.”

The Supreme Court of the United States, in *Cook County National Bank v. U. S.*, 107 U. S., 445, has held that this section furnishes a complete code for the distribution of the assets of an insolvent National Bank and its provisions cannot be departed from.

The litigation arose in a suit by the United States against the insolvent bank and its Receiver to establish a preference on a deposit of “Postal funds,”

\$24,900.00, and of "Money Order funds," \$14,684.00, which are respectively designated on its books by those names. The Court ordered that the amount found to be due should be paid in full out of the assets of the bank. To this order an appeal was taken to the Supreme Court of the United States.

Mr. Justice Field, in writing the opinion, said in part:

"* * * We consider that act as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed, the amount of circulating notes they may issue, the security to be furnished for the redemption of those in circulation, their obligations as depositaries of public moneys, and as such to furnish security for the deposits, and designating the consequences of their failure to redeem their notes, their liability to be placed in the hands of a receiver, and the manner, in such event, in which their affairs shall be wound up, their circulating notes redeemed, and other debts paid, or their property applied toward such payment. Everything essential to the formation of the banks, the issue, security, and redemption of their notes, the winding up of the institutions, and the distribution of their effects, are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates. * * *

"This section (5236) provides for the distribution of the entire assets of the bank, giving no preference to any claim except for moneys to reimburse the United States for advances in redeeming the notes. When this reimbursement

is fully provided for, the balance of the assets, as the proceeds are received, is subject to a ratable dividend on all claims proved to the satisfaction of the receiver, or adjudicated by a court of competent jurisdiction. Any sum remaining after the payment of all these claims is to be handed over to the stockholders in proportion to their respective shares. These provisions could not be carried out if the United States were entitled to priority in the payment of a demand not arising from advances to redeem the circulating notes. The balance, after reimbursement of the advances, could not be distributed, as directed, by a ratable dividend to all holders of claims; that is, to all creditors. * * *

"A law embracing an entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of a general law as effectually as though, as to such subject, the general law were in terms repealed. * * *

"It follows from the views expressed that the decree of the court below must be reversed and the cause be remanded, with directions to sustain the demurrer and dismiss the bill. And it is so ordered. * * *"

Mr. Justice Fuller observed as follows, in the case of *Ex parte Chetwood*, 165 U. S., 443:

"The receiver was appointed by the comptroller of the currency January 14, 1889, and Chetwood commenced his suit July 19, 1890. The receiver was not the officer of any court, but the agent and officer of the United States, as ruled by Mr. Justice Gray, on circuit, in *Price v. Abbott*, 17 Fed. 506, and by Mr. Justice Jackson, then circuit judge, in *Armstrong v. Trautman*, 36 Fed. 276. And see *Porter v. Sabin*, 149 U. S. 473,

479, 13 Sup. Ct. 1008; *Platt v. Beach*, 2 Ben. 303, Fed. Cas. No. 11,215; *Frelinghuysen v. Baldwin*, 12 Fed 395; *Armstrong v. Ettlesohn*, 36 Fed. 209.

"It has been so often decided that the authority vested in the comptroller to appoint a receiver of a defaulting or insolvent national bank, or to call for a ratable assessment upon its stockholders, is not open to objection because vesting that officer with judicial power in violation of the constitution, that we have recently declined to reexamine that question. *Bushnell v. Leland*, 164 U. S., 684, 17 Sup. Ct. 209.

"The receiver acts under the control of the comptroller of the currency, and the moneys collected by him are paid over to the comptroller, who disburses them to the creditors of the insolvent bank."

If, therefore, the decree in the instant case complained of violates this section, it should be reversed. Unless these rents are impressed with a trust, they became assets in the hand of the Receiver, and the decree entered violates the statute.

The plaintiff below does not assert that these rents were trust funds, or that he had a lien on them. He sets out no facts that could establish any fiduciary relationship between the plaintiff and defendant below. He merely asserts what amounts to an unjust enrichment of general creditors, if the rents are not paid over to him, and the chancellor, in so decreeing, has not found the existence of either trust or lien, and nothing in the pleadings, or in the deed of trust, would justify such a finding. Hence the decree recognizes that these rents are assets of the insolvent bank in the possession of the Receiver.

II.

TITLE 5236 FURNISHES A COMPLETE CODE OF DISTRIBUTION FOR THE ASSETS OF AN INSOLVENT NATIONAL BANK.

The Supreme Court of the United States has conclusively held in *Cook Co. National Bank v. United States*, 107 U. S., 445, that neither the Receiver, the Comptroller of the Currency, nor the Court can depart from the specific terms of this statute, which requires a ratable distribution of assets.

In the case of *In Re Earle*, 92 Fed. 22, the Court has held that the courts have no general advisory or liquidating power of the liquidation of insolvent national banks.

By the decree entered here, however, the lower court has unqualifiedly ordered the payment of a definite sum of money out of the assets of the insolvent bank, without regard to the amount of any claim which the plaintiff below asserted or sought to establish against the insolvent bank and without regard to the statutory requirement that the assets should be ratably distributed among the general creditors. The plaintiff below has not attempted to set up a claim as a general creditor. Obviously, he could not do so, because the defendant bank at no time assumed the debt or became liable on the notes. The effect of this decree, therefore, is to establish a preference claim, which arises neither under a trust, nor a lien, is not within any of the preferences named in the statute and therefore violates the provisions of the statute governing distribution.

In the case of the *First National Bank of Chicago v. Selden*, Receiver of the First National Bank of Niles (120 Fed. 212). the Court used the following significant expression:

“* * * it is clear that as against the receiver, executing his trust, the Federal law alone is applicable. In such a case the Federal trust must be administered according to the mandate of the Federal law.”

Further than this, the form of the decree herein entered was disapproved in *Case v. Citizens' Bank*, 100 U. S. 446, wherein the court said, inter alia,

“In a suit against a receiver of an insolvent national bank to establish the claim of a creditor and his right to a dividend, the decree should not direct the payment of a dividend by the receiver, since the assets of such bank are, under the statutes, entirely within the control and disposition of the comptroller of the currency, but should direct that the claim of the creditor, as established, be certified to the comptroller, to be paid in due course of administration.”

III.

A MORTGAGOR IS ENTITLED TO TAKE RENTS TO HIS OWN USE SO LONG AS HE REMAINS IN POSSESSION.

Certainly the real estate owned and in possession of the bank was an asset of the bank. Therefore, the rents, issues and profits from that real estate while the bank and its Receiver were in possession were assets of the bank and must be distributed ratably among the general creditors of the bank. In *Teal v. Walker*, 111 U. S., 242, the rule was laid down that

the mortgagee is not entitled to demand the rents and profits from the owner of the equity of redemption in possession.

During all of the period covered by this controversy the Federal-American National Bank and Trust Company was the owner of the equity of redemption. The real estate was in possession of and administered by the Conservator and Receiver. Since the Supreme Court of the United States held in *Teal v. Walker*, 111 U. S., 242, that the mortgagee is not entitled to demand the rents and profits from the owner of the equity of redemption, certainly the mortgagee is not entitled to demand the rents and profits from a receiver of the owner of the equity.

Particularly is this true when the receivership is a statutory receivership and the statute provides a complete code, which includes a distribution of assets binding upon the receiver and the courts.

But it may be urged that the demand for the rents, following default, was an ouster of possession. That, however, is not the rule in this Jurisdiction. Every principal here involved, except the statutory limitation upon the receiver, was before the court in the case of *Eastern Trust v. American Ice Company*, 14 App. D. C., 304. Johnson, assignee, in possession, collected rent which he held subject to final decree. The plaintiff filed a bill, among other things, for a receiver and an accounting for rents. The record showed a demand for rents, and also a landlord and tenant proceeding for ouster, which, in *Willis v. Trust Co.*, 169 U. S., 295, was held to have been ineffective as a legal demand for a surrender of the

premises. Mr. Justice Alvey, who wrote the opinion, in so far as the same deals with the appointment of a receiver, the necessity for actual dispossession, and the right to rents and profits free from any claim of the mortgagee, stated the law to be as follows (*Eastern Trust Co. v. American Ice Co.*, 14 App. D. C., 304):

“The next question presented is that in regard to the rents received by the assignee, Johnson, from the tenant of the property here in Washington City, before the improvements on the property were destroyed by fire; complainant claiming to be entitled to those rents from the expiration of the 90 days’ notice given and demand made for the surrender of the premises under the Landlord and Tenants’ Act of this District, that is to say, 90 days after the 30th of July, 1894, to the time of filing of the bill. That proceeding, however, was ultimately held by the Supreme Court to be wholly without warrant of law. (*Willis v. Eastern Trust and Banking Company*, *supra*, 169 U. S. 295). The demand, therefore, was not a legal demand for the surrender of the premises, within the power given by the mortgage of entry and possession, in order to make sale under the power. And not being entitled to the possession under the proceeding taken, the complainant as mortgagee was not entitled to the rents of the property; for until the mortgagor, or its assignee, **had been lawfully dispossessed**, it was entitled to receive the rents and profits of the mortgaged premises. This is the established doctrine. *Wilder v. Houghton*, 1 Pick. 87; *Mayo v. Fletcher*, 14 Pick. 525; *Russell v. Allen*, 2 Allen 42; *Watts v. Coffin*, 11 John 495; *Chinney v. Blackman*, 3 Douglass 391; *Hughs v. Edwards*, 9 Wheat. 500.

"In the case of *Teal v. Walker*, 111 U. S., 242, the Supreme Court of the United States, in consideration of this question said: 'We believe that the rule is, without exception, that the mortgagee is not entitled to demand of the owner of the equity of redemption the rents and profits of the mortgaged premises, until he takes **actual possession**'. * * * And in the case of *Willis v. Eastern Trust and Banking Company*, 169 U. S. 295, the case involving the right of the present complainant *to present* under the Landlord and Tenants' Act to recover possession of the mortgaged premises, the Supreme Court said: 'Until the mortgagee takes **actual possession** the mortgagor is not liable, without the express covenant to that effect, to pay rents, and is entitled to take the rents and profits to his own use. Citing *Teal v. Walker*, *supra* (111 U. S. 242), and *Freedman v. Shepherd*, 127 U. S. 494, 502, 'The result is that the plaintiff is not entitled to maintain this process, but must be left, so far as the aid of a Court of Justice is requisite to secure the rights conferred by the mortgage, to the appropriate remedy of a writ of ejectment, or bill of foreclosure.' * * * The complainant never having the actual possession of the property, there is no claim to the rents and profits that have been received by Johnson, as assignee of the Ice Company, and therefore the Court below was quite right in decreeing that the complainant was not entitled to any accounting for and in respect to such rents * * *." (Accentuation ours.)

CONCLUSION

The foregoing decision follows the law as laid down by the Supreme Court of the United States. There is no authority to the contrary. The Receiver

in this cause has collected the rents claimed by plaintiff below. They are assets of an insolvent national bank, they are under the control of the Comptroller of the Currency, they are deposited in the Treasury of the United States, they are subject to distribution only in accordance with Sections 5234 and 5236 of the Revised Statutes of the United States. The decree entered herein establishes a preference not within the statute and would prevent distribution in accordance with the terms of the statute.

Therefore the appellant maintains that this decision—

1. Violates the statute.
2. Is contrary to the principles of the common law.
3. Deprives the appellant of a vested property right contrary to the established principles of common law.
4. Would compel the Comptroller of the Currency and his Receiver to violate the statute, or stand in contempt.

Hence it is respectfully submitted that the decree must be reversed and the cause ordered dismissed.

HUSTON THOMPSON,
HERBERT S. WARD,
Attorneys for Appellant.

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TROLLER OF THE CURRENCY OF ASSIGNMENTS OF
ERROR, TRANSCRIPT OF RECORD AND BRIEF FILED BY
APPELLANT, CARY A. HARDEE, RECEIVER OF THE FED-
ERAL AMERICAN NATIONAL BANK AND TRUST COM-
PANY, A CORPORATION.

GEORGE P. BARSE,
Room 307, Treasury Building,
J. F. ANDERSON,
Room 309, Treasury Building,
Attorneys for
J. F. T. O'Connor,
Comptroller of the Currency.

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Comes now the defendant J. F. T. O'Connor, Comp-
troller of the Currency and adopts, by reference, the
assignments of error, the transcript of record, and the
brief, filed in this court in this cause by the appellant,

Cary A. Hardee, Receiver of the Federal American National Bank and Trust Company, a corporation, said Receiver having perfected said appeal, completed the record and filed said brief, as the agent and representative, and by direction of the Comptroller of the Currency, as provided by law.

GEORGE P. BARSE,
Room 307, Treasury Building,
J. F. ANDERSON,
Room 309, Treasury Building,
Attorneys for
J. F. T. O'Connor,
Comptroller of the Currency.

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Henry W. Hodges
**United States Court of Appeals for the
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OCTOBER TERM, 1934.

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RENCY, APPELLANTS,

vs.

AMERICAN SECURITY AND TRUST COMPANY,
A CORPORATION.

BRIEF FOR APPELLEE.

FREDERIC D. MCKENNEY,
JOHN S. FLANNERY,
G. BOWDOIN CRAIGHILL,
Attorneys for Appellee.

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AMERICAN SECURITY AND TRUST COMPANY,
A CORPORATION.

BRIEF FOR APPELLEE.

Short Statement.

By this appeal, appellant Hardee, Receiver of an insolvent National Bank, seeks a reversal of a decree in equity, entered by the Supreme Court of the District of Columbia, directing him to pay to appellee the sum of \$5,262.77, representing so-called net rents collected by him, as Receiver, (and by his predecessor, as Conservator,) from an apartment house property, which was covered by a first deed of trust given to secure appellee's loan of \$110,-

000. The Receiver (and Conservator), who succeeded to the Bank's ownership of the equity in the real estate, had collected the rents, after suspension of the Bank for insolvency, and claimed the right to distribute this income among general creditors of the Bank, without recognizing any obligation to pay taxes on the property or interest on the first trust loan, which accrued during the period of the receivership and conservatorship. Such taxes and interest aggregated \$7,728.16 and were, therefore, greatly in excess of the net rents, which totaled \$5,262.77, after deducting ordinary operating expenses incident to janitor and elevator service, light, power and heat.

Stipulation.

The case was tried in the lower Court upon a *stipulation* (R. 30-31), under which it was agreed, in effect, that all of the important allegations of fact in appellee's amended and supplemental bill of complaint were true, with the exception of certain details as to the exact amount of rent collected by the Receiver and exact amount of interest and taxes accruing during the receivership. An agreed statement with respect to these facts was also included in the stipulation (R. 31).

Facts.

Eliminating details, which appear unimportant, the *facts* disclosed by the pleadings and stipulation may be briefly stated, in chronological sequence, as follows:

December 12, 1927—The American Security and Trust Company, hereinafter called the "plaintiff," or "appellee," loaned to Leslie E. F. Prince \$125,000, for which amount he signed and delivered to plaintiff his promissory notes secured by a first deed of trust executed by him covering a large apartment house located at 2900 14th

Street N. W. (R. 14-15). The deed of trust, Exhibit A, is set forth in the record (R. 21-25).

November 1, 1930—Prince's equity having been acquired by foreclosure under a second deed of trust by the Merchant's Bank and Trust Company, the latter Company conveyed the property subject to the first trust, to the Federal American National Bank and Trust Company, hereinafter called the "Bank" (R. 16). The Bank collected the gross rents, paid operating expenses therefrom and paid taxes and interest on the first trust notes through December, 1932. Payments were also made on the principal, reducing the principal to \$110,000 (R. 17).

February 2, 1931—The first trust notes being overdue, the Bank conveyed the property to McCambridge and Meany, who executed agreements with plaintiff extending the maturity of the notes to December 12, 1933, and immediately reconveyed the property to the Bank two days later on February 4, 1931 (R. 16). McCambridge and Meany were "straw parties," to whom the property was conveyed for the above purpose (R. 20).

March 6, 1933—The Bank was closed by Proclamation of the President of the United States and has never reopened (R. 16).

March 14, 1933—John Poole was duly appointed Conservator of the Bank, took possession of its assets, including the apartment house, and collected the rents therefrom (R. 16-17).

November 1, 1933—Appellant, Cary A. Hardee, was appointed Receiver of the Bank, took possession of its assets, including the apartment house, and collected the rents therefrom until January 30, 1934 (R. 17). For brevity, the period from March 14, 1933, to January 30, 1934, will be described as the "receivership period," making no distinction between the conservatorship and receivership.

During the receivership, nothing was paid on account of interest on the first trust notes, or on account of taxes accruing on the apartment house property (R. 17).

December 16, 1933—Various demands, oral and written, to have the rents applied in payment of taxes and interest on the first trust notes having been made by plaintiff first upon the Conservator and then upon the Receiver, and such demands having been entirely disregarded, plaintiff filed this suit and a rule was issued herein against the Receiver and Comptroller of the Currency to show cause why a receiver should not be appointed to collect the rents and apply them to the payment of taxes and interest (R. 17-18). Receiver Hardee thereupon filed a motion to dismiss the bill and discharge the rule, suggesting that plaintiff had an adequate remedy by foreclosure sale.

January 30, 1934—Plaintiff thereupon had the property advertised for sale and it was sold on January 30, 1934, under the first deed of trust to plaintiff for \$85,000, leaving a deficiency of \$35,532.26 due plaintiff on account of the first trust notes (R. 18), as shown by Exhibit B (R. 26).

March 2, 1934—When this cause came on for hearing in the lower court on the Receiver's motion to dismiss the original bill, the plaintiff informed the court of the sale and of the fact that it was, therefore, no longer necessary to have a receiver appointed for the property. The court thereupon entered an order dismissing the original bill without prejudice and with leave to the plaintiff to file an amended and supplemental bill (R. 18, 13).

April 4, 1934—Plaintiff's amended and supplemental bill was filed, setting forth above facts and alleging that under the first deed of trust, Leslie E. F. Prince, owner of the property, to whose title and legal responsibilities the Receiver succeeded in the manner above stated, agreed to pay the notes and taxes when due and it was agreed that the

owner should receive the rents *until default*, but upon default, the Trustee was authorized to sell the property and apply the proceeds in satisfaction of the debt, taxes and other expenses; that the first default occurred in March, 1933, when the property was already in the possession of the Conservator, and in an effort to cooperate in the orderly administration of the assets of the insolvent Bank, plaintiff refrained from making an immediate sale, but claimed that, *after said defaults*, plaintiff was entitled to have the rents applied on the overdue taxes and interest. and demanded that the Conservator and Receiver should so apply the rents, but plaintiff merely received replies that the matter had been submitted to the Comptroller of the Currency for decision and no decision had been received from the Comptroller (R. 19). In the amended bill it was further charged that the plaintiff had a preferred right, in equity, to the net rents superior to the claims of general creditors of the insolvent Bank and it would be inequitable and unjust to permit the Receiver to retain the rents for the benefit of such general creditors and not pay the accruing interest on the first trust and not reimburse the plaintiff for the accruing taxes which plaintiff finally paid, after the foreclosure sale on January 30, 1934. (R. 18-19.)

June 28, 1934—By the stipulation, it was agreed that during the receivership period from March 14, 1933, to January 30, 1934, taxes in the sum of \$2,273.16 accrued, and interest in the sum of \$5,455.00 accrued on the first trust notes, a total of \$7,728.16, while the net rents collected, after deducting ordinary operating expenses, amounted to \$5,262.77. (R. 31.)

Hearing and Decree.

The case came on for hearing on June 19, 1934, before Mr. Justice O'Donoghue, on motions filed by the Receiver and Comptroller to dismiss plaintiff's amended and sup-

plemental bill and such motions were overruled by an order entered on June 28, 1934 (R. 30).

The receiver had already filed an answer (R. 27-28) to the rule, which was issued upon the filing of the amended bill, and, there being no dispute as to the facts, counsel for the respective parties filed the stipulation above described (R. 30-31).

Thereupon, on June 28, 1934, upon consideration of the amended bill, answer and stipulation, the court entered a final decree directing the Receiver and Comptroller to pay over to the plaintiff the net rents collected during the receivership in the sum of \$5,262.77 to be applied on account of the taxes and first trust interest which accrued in the total sum of \$7,728.16 during the receivership (R. 32).

ARGUMENT.

Appellant Hardee states, in his brief, which was adopted by Appellant O'Connor, three main propositions, none of which are controverted by appellee in so far as they are *general principles* of law, but appellee contends that they are subject to the qualifications hereinafter set forth and that such general propositions have little, if any, bearing upon the questions at issue in this case.

I.

Reply to appellants' point that the receiver of an insolvent national bank must pay ratable dividends to creditors.

Appellee concedes that under Section 5236 R. S. U. S., now Section 194, Title 12, U. S. Code, the receiver of an insolvent bank must pay ratable dividends to creditors of the bank, but the question with which we are concerned, is the source from which such dividends are to be paid. The

receiver is a *liquidating officer*, who is charged with the duty to "*close up*" the bank and, *for that purpose*, Section 5234 R. S. U. S., being Section 192, Title 12, U. S. Code, authorizes him to collect and take possession of the assets of the bank; to compound bad debts; to sell all the real and personal property and "pay over all money *so made* to the Treasurer of the United States, subject to the order of the Comptroller." Then, under Section 5236, the Comptroller is directed to make "a ratable dividend of the money so paid over to him by such receiver."

Appellee contends that the "money so made," or "proceeds of the assets" of the bank, are the *net* proceeds of sale, or *net* income collected by the receiver, and, while the term "net rents" is sometimes used to describe gross rents less operating expenses, the income from such real estate as the apartment house here involved, does not become *net income* until after there has also been deducted the taxes accruing on the property and interest on the mortgage thereon.

Section 5238 R. S. U. S., being Section 196, Title 12, U. S. Code, expressly provides that "*all expenses* of any receivership shall be paid out of the assets of such association (bank) *before distribution of the proceeds thereof.*"

II.

Reply to appellant's point that Section 5236 R. S. U. S. furnishes a complete code for liquidation of an insolvent national bank.

Appellee concedes that the courts have used general expressions to the effect that the Federal statutes provide a "complete system for the establishment and government of national banks" (*Cook County Bank v. United States*, 107 U. S. 445, 448, cited by appellants), and in an isolated case entitled "*In re Earle*," 92 Fed. 22, cited by appel-

lants, a District Court judge refused to sign an order authorizing a receiver of a bank to sell certain collateral, remarking that "no general advisory or directing power (over the receiver) is vested in the court."

On the other hand, the receiver of a national bank must obtain authority from a court of record, before he can sell any of the property of the bank or compound bad or doubtful debts, Section 5234 providing that such receiver,

"upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, *on such terms as the court shall direct.*"

Before a receiver may compromise the individual liability of a stockholder of a national bank, he must obtain authority therefor from a court of record of competent jurisdiction (Act of February 25, 1930, 46 Stats. L. 74).

A receiver of a national bank can sue and be sued. He is not a sacrosanct official, placed upon a pedestal above and superior to the control of the courts, especially when, in his official capacity, he undertakes to follow a course which would be condemned as unfair and unjust, if attempted by an individual.

If, as claimed by appellee, the Receiver in this case paid over to the Comptroller, as "*proceeds of the assets*" of the insolvent bank, funds to which appellee was equitably entitled, the lower court was not powerless to correct the wrong, but had complete authority to enter the decree against the Receiver and Comptroller for the purpose of compelling them to make a fair and just disposition of the net income derived from the property.

III.

Reply to appellants' point that a mortgagor in possession is entitled to rents.

Appellee concedes that, as a general proposition, in the absence of a provision to the contrary in the mortgage or deed of trust, a mortgagor is entitled to the rents and profits of the real estate so long as he remains in possession thereof. This was decided in *Teal v. Walker*, 111 U. S. 242, which was followed by this Court in *Eastern Trust Company v. American Ice Company*, 14 App. D. C. 304.

Therefore, so long as the Federal American Bank remained in possession, *especially while there was no default in the payments due under the deed of trust*, the Bank was entitled to the rents. Incidentally, the Bank, while collecting the rents, recognized its obligation to pay and always did pay not only the expenses incident to the operation of the apartment house, but also the taxes and interest on the mortgage notes (R. 17).

Shortly after the Bank was closed and placed in the hands of the Conservator in March, 1933, the first default occurred in the payment of taxes and the semi-annual interest due June 12, 1933, was not paid (R. 17).

Appellee promptly made demands upon the Conservator and later upon the Receiver that the rents be applied, after payment of operating expenses, to taxes and interest on the first trust notes, before applying the balance, if any, to the claims of general creditors of the insolvent Bank, but such demands were ignored (R. 19).

The courts of some jurisdictions hold that such a demand is all that is necessary to entitle the mortgagee to the rents; that in order to put an end to the authority of a mortgagor to collect the rents, it is only necessary for the mortgagee to manifest his intention to do so; that, for this purpose,

“slight acts” will be deemed sufficient. *Baker v. Baker*, 108 Md. 269.

IV.

Under circumstances of this case, upon default during receivership, appellee became entitled to have rents applied to taxes and interest, but could not sue receiver therefor in action at law.

Appellee had no adequate remedy at law because, under the Federal decisions above cited, he could not sue the Receiver at law to recover the rents as such.

In many cases where mortgagor corporations, other than National Banks, have become insolvent and court receivers have been appointed to take possession of their real estate, it has been frequently held that the mortgagees could not sue at law for the rents, but could intervene in the equity proceedings and request the court to compel its receiver to apply the rents to the payment of taxes and interest on the mortgage notes.

Mr. Justice Van Devanter, while on the Circuit Court of Appeals for the Eighth Circuit, wrote an exhaustive opinion on this subject, saying:

“The mortgagor was not in possession, but a receiver was, and he was not collecting the income for the benefit of the trust company [mortgagee]. To be effectual, a demand should generally be addressed to one who possesses the authority to determine whether it shall be granted or refused. Here the demand for the income could not be acted upon by others than the court, and it so vitally affected the existing receivership that, to be effectual, it was essential it should be presented to the court in the receivership suit. The trust company, therefore, in pursuance of the only course open to it—clearly the correct one—obtained the leave of the court, and, intervening in the receivership suit, filed therein a petition setting forth the facts showing

its right to the income, and containing ample prayers to entitle its claim to recognition. This intervention in aid of its pending suit for a foreclosure was an effective assertion of the trust company's claim, and operated to charge with the *lien of its mortgage* all the *income* subsequently earned."

Atlantic Trust Co. v. Dana, 128 Fed. 209, 219.

Followed in

First National Bank v. Stuppi, 2 Fed. (2d) 822;

Mortgage Loan Co. v. Livingston, 45 Fed. (2d) 28.

Appellee's remedy, therefore, was to file this bill in equity to have a receiver appointed to collect the rents and apply them equitably, or to compel the receiver of the bank to so apply them.

Appellants now claim that appellee should have proceeded by foreclosure sale, but the courts will take judicial notice of the conditions which existed in March, 1933, when all of the banks in the United States were closed by Proclamation of the President. Many States were declaring moratoria prohibiting foreclosures, and it was no time for the appellee, a trust company, to start foreclosure proceedings against the real estate of a bank which was in the hands of a conservator. No one then knew whether the bank would be reopened or closed permanently. Attempted foreclosure would probably have been enjoined as contrary to the trend of current legislation.

Accordingly, appellee waited a reasonable time until the principle of the mortgage debt became due in December, 1933, and then filed this suit, after it had been decided that the bank should be closed permanently and placed in the hands of a receiver for liquidation (R. 18).

The receiver replied by suggesting that appellee should foreclose and, pursuant to that suggestion, appellee sold the property at foreclosure sale on January 30, 1934, a large

uncollectible deficiency of \$35,532.26 resulting therefrom (R. 26).

If the contentions of the appellants are sustained, the appellee, in addition to suffering this heavy loss, will be penalized for following the fair and commendable course above outlined, while the general creditors of the insolvent bank will receive a "ratable distribution" of rents, to which they can not possibly have a just or equitable claim.

Aside from the special circumstances of this case, however, there is ample authority, as hereinafter shown, for the court's decree compelling the receiver to apply the rents to the payment of taxes and interest.

V.

Taxes—It was the duty of the Receiver to pay taxes on the property.

It is quite significant that the word "taxes" is not mentioned in appellants' brief, except in the statement of fact at the beginning thereof.

There can be no doubt that all liquidating officers are required to pay taxes on property to which they acquire title and control for the purposes of liquidation and the Supreme Court has held that taxes are debts due the United States within the meaning of Section 191, Title 31, U. S. Code, giving such debts priority over all other debts in the administration of the estates of insolvent persons and corporations.

A.—Trustees in Bankruptcy.

Thus, with respect to Trustees in Bankruptcy, Congress has provided:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United

States, State, county, district, or municipality in advance of the payment of dividends to creditors.”

Sec. 64, a, Bankruptcy Act of 1898, or

Sec. 104, a, Title 11, U. S. Code;

Construed in

New Jersey v. Anderson, 203 U. S. 483.

B.—Court Receivers.

Receivers appointed by the courts are always required to pay taxes on the property placed in their possession before any income from such property becomes available for distribution among general creditors.

Chief Justice Fuller has forcibly commented upon the duty of a court receiver to pay taxes, saying that it is the “imperative duty of the court to recognize as paramount, and enforce with promptness and vigor, the just claims of the authorities for the prescribed contributions to state and municipal revenue.”

In re Tyler, 149 U. S. 164, 187.

In holding that taxes on property in the hands of court receivers have priority over “all other claims except judicial costs,” the Circuit Court of Appeals for the Ninth Circuit said:

“And whether or not such taxes be a lien or a debt by the laws of the government within whose jurisdiction the property is situated, such taxes are and should be regarded by the courts as a preferred and paramount claim over all other claims, for they are essential to the existence and maintenance of the very government under which the property is acquired and protected.”

Coy v. Title Guarantee & Trust Co., 220 Fed. 90.

Many other authorities, relating to the duty of court receivers to pay taxes, could be cited, some of the recent Federal cases being:

Bear River Paper & Bag Co. v. City of Petoskey, 241 Fed. 53;

Union Trust Co. v. Great Eastern Lumber Co., 248 Fed. 46;

Hammond v. Carthage Co., 8 Fed. (2d) 35;

MacGregor v. Johnson-Cowdin-Emmerich, 39 Fed. (2d) 574;

Central Vermont Ry. v. Marsch, 59 Fed. (2d) 59.

C.—Statutory Receivers of Banks.

The same reasoning applies to statutory receivers of insolvent banks. Such receivers stand upon no higher plane because they are appointed by the Comptroller of the Currency instead of a court. Counsel for appellee have been unable to find any case directly relating to the duty of bank receivers to pay taxes, probably because such receivers have heretofore always recognized their obligation to pay taxes without raising any question in regard thereto.

If there is no precedent for requiring a statutory receiver to pay taxes, then this case affords an unusual opportunity to establish such a precedent, as it will be in accord with the decisions relating to other liquidating officers and there is no precedent to the contrary.

In this case, after the foreclosure sale, appellee was forced to pay the taxes in question (R. 18) and is entitled to be reimbursed therefor. A similar situation was considered in a recent Federal case, in which the court said:

“We think it clear that, so far as the taxes levied before the appointment of the receiver are concerned, the trust company is merely a general creditor; the claim arising out of breach of covenant by Carthage Company. But, so far as taxes levied while the mort-

gaged property was in possession of the receiver are concerned, there can be no default by Carthage Company, which was inhibited from paying; and the amount paid by the trust company cannot give rise to a claim for breach of contract against Carthage Company. Consequently we consider taxes levied against the property while in the hands of the receiver as expenses of the receivership. Therefore the receiver should reimburse the trust company for the taxes of 1924 out of whatever funds he may ultimately have to pay receivership charges."

Hammond v. Carthage Sulphite Co., 8 Fed. (2d) 35.

In the present case, appellee is making no claim for taxes which accrued prior to the receivership.

VI.

Rents constituted a "trust fund" which Receiver was under obligation to apply equitably.

It is not a part of the ordinary business of a bank to operate an apartment house. The apartment house involved in this case was inherited by the Federal American Bank from the Merchants Bank, which acquired it in satisfaction of a bad debt (R. 16).

The record in this case shows that this property was never, during 1933, worth as much as the first mortgage of \$110,000, the rents during the period of the receivership having been much less than the carrying charges (R. 31) and when it was finally sold in January, 1934, it brought only \$85,000 (R. 26).

If the Conservator and Receiver believed that their supposed equity was of no real value, they could have relieved themselves of all responsibility in connection therewith by obtaining authority of Court to sell such equity and, if that was not possible, to abandon the property by turning it over to the holder of the first mortgage.

But the Conservator and Receiver elected to operate the property. Upon so doing, they took charge of it *cum onere* and, out of the rents collected, they were under an obligation to pay *all carrying charges*, including taxes and first trust interest as well as operating expenses, before they had any *net* "proceeds" to turn over to the Comptroller for distribution ratably among general creditors.

According to the argument of appellants, if carried to its logical conclusion, the Receiver was legally entitled to distribute all of the gross rents ratably among creditors of the bank and could not have been compelled by the courts to pay the janitor for his services or to pay for light, power and heat.

The courts will not permit any such absurd result and, if the Receiver will not do so voluntarily, the courts will compel him to pay the carrying charges upon a property and business which he undertakes to operate as an incident to his main job of liquidation.

In the recent case of *MacGregor v. Johnson-Cowdin-Emmerich, Inc.*, 39 Fed. (2d) 574, a mortgagee filed a petition to have a receiver compelled to pay taxes on a mill, which the receiver undertook to operate. The District Court refused relief and the mortgagee appealed, whereupon the Circuit Court of Appeals for the Second Circuit held that the receiver should not be compelled to pay the taxes which accrued *prior* to receivership, but should be compelled to pay all taxes which accrued *during* the occupation of the property by the receiver, saying:

"The taxes accruing after the receivers entered are in a different position. They could have refused to accept the mill, if they had thought the equity a burdensome asset. Having elected to enter, they took it *cum onere*, and the taxes, which were a condition upon their continued occupation, were as much a part of their expenses as heat, custody or current upkeep. So far as we have found, courts have universally re-

garded them as part of the receivers' expenses, when the question has come up. (Citing cases.) * * * It is true that in that case the occupation had resulted profitably, but that is not material. The receivers having once chosen to accept the property, the taxes were an expense of operation, regardless of the outcome. It would be a curious doctrine which allowed the general creditors to avoid them because their venture turned out badly; their representatives must consider that at the outset. *Every consideration of equity requires them to bear all charges incidental to the occupation which they have enjoyed.*"

MacGregor v. Johnson-Cowdin-Emmerich, Inc.,
39 Fed. (2d) 574, 576-577.

The leading case of *Rankin, Receiver, v. Emigh*, 218 U. S. 27, is quite pertinent to the issue now under consideration. There a creamery company, which encountered financial difficulties, had all of its stock transferred to officers of a bank, to which it was indebted. Thereupon the bank operated the creamery company, which accepted milk from "patrons" under contracts whereby the milk was converted into butter, the butter sold and, after deducting a commission for services, the creamery turned over the proceeds of sale to the patrons. Then the bank failed and, at the time of suspension, there were a number of checks outstanding in favor of patrons representing proceeds of sale of the butter. The bank also had on hand \$2,520.46 representing proceeds of sale of the butter, such amount being mingled with its other funds. The "patrons" sued the receiver of the bank and the Court held that so far as the outstanding checks were concerned, the patrons were general creditors, but the \$2,520.46 was a special fund, to which the patrons were entitled. The Supreme Court called attention to the statute forbidding national banks from engaging in any business other than banking and held that whether or not the operation of the creamery by the bank

was *ultra vires*, the receiver could be compelled to pay over this fund to the parties equitably entitled thereto, approving the following language of the lower court:

“No authority has been cited, and we think none can be, to deny the power of a banking corporation, or any other corporation, to disgorge property of another which it had got into its possession by any means whatever under a duty to disgorge. It may have had no legal power to take the steps by which the money of these plaintiffs’ assignors came to its hands; but having taken such steps and obtained their money no such absurdity exists as a legal obstacle to its surrendering it. It would be a reproach to the law to hold any such doctrine of inequity. *Beloit v. Heineman*, 128 Wisconsin, 398, 401.”

The Supreme Court then concluded its opinion with the following statement:

“although restitution of property obtained under a contract which was illegal, because *ultra vires*, cannot be adjudged by force of the illegal contract, yet, as *the obligation to do justice rests upon all persons, natural and artificial*, if one obtains the money or property of others without authority, the law, independently of express contract, will compel *restitution or compensation*. That this ruling is here applicable is plainly manifested by the fact which we have previously pointed out that the relief afforded by the court below simply gave to the producers so much of their property as was actually in the *hands of the receiver*, and awarded them a right to recover as general creditors of the bank to the extent only that their property had been received and appropriated by the bank” (prior to its suspension).

Rankin v. Emigh, 218 U. S. 27, 33, 35;

Citing

Central Transportation Co. v. Pullman Co., 139 U. S. 24;

Pullman Co. v. Central Transportation Co., 171 U. S. 138.

The applicability of the above case to the present situation is apparent. When the receiver decided not to sell or abandon but to operate the apartment house, the gross rents collected by him did not become *general assets*, to which general creditors were entitled, but constituted a *special fund*, upon which appellee had an *equitable lien*, which the receiver was under an obligation to satisfy, before the balance, if any, could be paid over to the Comptroller for distribution among general creditors.

There was no default under the first trust until *after* the Conservator and Receiver had taken possession. They caused the default by their wrongful refusal to apply the rents to the payment of taxes and interest. They could not take advantage of their own wrong by claiming that their own act, which caused the default, gave a superior claim to the general creditors, whom they represented. He who claims equity must do equity.

Cassedy v. Strauch, 61 App. D. C. 21.

In the recent case of *Cassedy v. Strauch*, appellant and his associates owned under a leasehold and were in possession of an apartment house, upon which taxes were overdue and there was danger of the leasehold being forfeited for default in payment of the ground rent due thereunder. The holder of some of the notes secured by deed of trust on the property applied for and obtained a receiver *pendente lite* and such receiver was ordered to pay overdue taxes. The parties in possession of the property made the same contention that the appellant advances here, namely, that the noteholders' remedy was by foreclosure sale; that the right to foreclosure did not carry with it the right to a receiver. This Court upheld the appointment of the re-

ceiver and also upheld the lower court's specific direction to the receiver to pay taxes, saying:

“Nor would this court be justified in reversing the order whereby appellant was required to pay over to the receivers from the income of the property such sum as was necessary for the payment of overdue taxes. The obligation rested upon appellant to pay the taxes accruing upon the property, and the money was used for that purpose pursuant to a prior understanding between the parties.”

Cassedy v. Strauch, 61 App. D. C. 21.

Conclusion.

In the early cases, where an individual had given a mortgage upon his own home, the rule arose that so long as the mortgagors remained in possession, he was not accountable to the mortgagee for rent, but, upon default, the mortgagee's remedy was to foreclose.

The reason for the rule does not apply with equal force to modern conditions where hotels, apartment houses and other large properties are involved and should not be extended to a case where it will cause gross injustice.

It has become a favorite scheme of speculators, who are financially irresponsible, to buy such properties, subject to large mortgages, by making small cash payments, and then delay foreclosure as long as possible, so that the “owners” may have an opportunity to milk the properties of all gross income and ignore the obligation to pay taxes and carrying charges. When the holder of the first mortgage finally realizes that patience is no longer a virtue, he forecloses and finds that he has suffered a heavy loss, with no prospect of recovering from the so-called “owner,” who has received and spent the income.

When an individual buys and operates an apartment house under such conditions, we call it a “racket” and

surely the courts will not permit a receiver, who is a representative of the United States Government, to be a party to such an unjust scheme.

In the present case, as early as February, 1931, the Bank officials realized that there was little, if any, equity in this property, and they had it conveyed to "straw parties," so that such parties could agree to an extension of the maturity of the mortgage notes and the Bank would avoid responsibility for payment of the notes, if it finally decided to abandon the property (R. 16, 20). Two days afterwards, the "straw parties" reconveyed the property to the Bank.

It may be said to the credit of the Bank officials that all carrying charges were paid so long as the Bank had control, but immediately after the Conservator took possession in March, 1933, the Conservator *caused a default* by refusing to apply the rent to the payment of taxes and interest on the first trust notes. To be more exact, during the period of the receivership from March 14, 1933, to January 30, 1934, the Conservator and Receiver collected \$8,428.70 in gross rents, paid operating expenses in the sum of \$3,165.93, and turned over the balance of \$5,262.77 to the Comptroller for ratable distribution among general creditors of the Bank and completely ignored the obligation to pay taxes in the sum of \$2,273.16 and to make payments on account of first trust interest in the sum of \$5,455.00, *which accrued during the same period*. Appellee has made no claim to the taxes and interest which accrued prior to March 14, 1933, when the Conservator assumed control.

Appellants *now* assert that appellee should have foreclosed sooner, but during the turmoil and confusion that existed in 1933, when legislation was being enacted throughout the country declaring moratoria, neither the Conservator nor Receiver requested or desired a foreclosure, and a court of equity probably would have enjoined it.

A mere statement of the facts demonstrates the injustice of the position now assumed by the Receiver. Appellee was entitled to an equitable lien on this *special fund* of \$5,262.77, superior to the claims of general creditors of the Bank, and the lower Court was fully justified in entering the decree directing appellants to turn over such fund to the appellee to be applied towards the payment of taxes and interest aggregating \$7,728.16, which accrued during the receivership.

It is, therefore, respectfully submitted that the decree of the lower Court should be affirmed.

FREDERIC D. MCKENNEY,
JOHN S. FLANNERY,
G. BOWDOIN CRAIGHILL,
Attorneys for Appellee.

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Henry W. Hodges

CLERK

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1934.

—
No. 6282.
—

CARY A. HARDEE, Receiver, Federal-American National
Bank and Trust Company, a Corporation, JAMES
F. T. O'CONNOR, Comptroller of the Currency,
Appellants,

vs.

AMERICAN SECURITY AND TRUST COMPANY,
A Corporation.

—
REPLY BRIEF OF THE APPELLANT.
—

HUSTON THOMPSON,
HERBERT S. WARD,
Attorneys for Appellant.

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vs.

AMERICAN SECURITY AND TRUST COMPANY,
A Corporation.

REPLY BRIEF OF THE APPELLANT.

The appellee admits the law to be that the mortgagor in possession collects rents and profits to his own use. Section 5234 of the National Banking Act requires all assets coming into the hands of the Receiver to be deposited in the Treasury of the United States. Section 5236 requires the Comptroller of the Currency to pay out all such assets ratably.

The appellee proceeds to argue that Equity does not follow the law, and urges that this Court should (as the lower Court did) disregard both the Common Law and statute. Hence an analysis of his points and authorities follows.

POINT I.

It is a sufficient answer to here point out that the appellee is not suing for the taxes and the interest which accrued between the date of the appointment of a Conservator and the sale of the property. He is not, therefore, asking judgment for "expenses of any receiver".

What he is asking for is something to which the law gives him no right; *i. e.*, rents reduced to possession by the mortgagor while he was lawfully in possession of the realty. Section 5238 R. S. to which he refers applies to expenses incurred,—not rents collected by a receiver.

POINT. II

Appellee contends that Section 5234 confers some power on an Equity Court which it may exercise in this case irrespective of the rule laid down in *Cook County Bank v. United States*, 107 U. S. 445. Section 5234 requires an order of Court in order that the Receiver may sell or compound bad or doubtful debts, and on a like order "may sell all the real and personal property of such association * * *."

This controversy involves no sale. It is analogous to *In Re Earl*, 92 Fed. 22, wherein the Court held it was without power under Section 5234 to authorize private sale of pledged stock certificates, the proceeds to be applied in part payment of notes.

Of course, the Receiver of a National Bank can, in a proper case, sue and be sued, but a Court of Equity cannot, contrary to both statute and Common Law, decree that rents lawfully collected by a statutory Receiver in possession, constitute a trust fund to reimburse a mortgagee for taxes which he paid on property he purchased, and interest which he claims.

POINT III.

The appellee here argues that his demand on the Conservator and Receiver for the rents was sufficient and relies upon *Baker v. Baker*, 108 Md. 269. *Baker v. Baker* proceeded under Article 16, Section 192 of the Maryland Code, and was a controversy between the defendant, either as doweress or mortgagee, and the heirs at law of the decedent. The petition shows that the defendant widow was claiming and demanding the rents which remained unpaid and uncollected although it does not say that she was doing so as mortgagee. In this case the heirs at law prayed for a Receiver to collect and hold the rents accruing and accrued. The lower Court appointed such a Receiver. The Court of Appeals held that this order was improvidently passed. The Court quotes from *Barron v. Whiteside* the following:

“When a mortgagor is allowed to remain in possession after default, he is entitled to collect for his own use the rents and profits, but after demand for possession by the Mortgagee, or a demand for the rents, then the mortgagee is entitled to the same.”

Possession here was in a trustee who, after default and demand for possession, wrongfully refused to

yield. The Court held as to rents collected after his wrongful refusal that to permit him to retain them would be to permit him to profit by his own wrong. On page 450 the Court says:

“Of course, the mortgagor’s possession is rightful, not only until default, but also afterwards until the Mortgagee demands possession.”

In the case at bar the mortgagee does not allege that he ever demanded possession, or that he ever was refused possession.

In *Dow v. Rail Road Co.*, 124 U. S. 654-5, the Court said:

“ ‘the general rule is that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he demands actual possession, or until possession is taken *in his behalf* by a receiver, or until, in proper form, *he demands and is refused* possession.’ In *Freedman v. Shepard*, 127 U. S. 502-3 the Court outlines the following as sufficient after default to terminate the right of a mortgagor in possession, to rents: ‘a notice by mortgagee to tenants (*Clark v. Abbott*, 1st Md. 475); notice to an agent appointed by the mortgagor to collect the rents (*Crosby v. Harlow*, 21 Maine, 500), bill in equity (*Dow v. Rail Road Co.*, 124 U. S. 652), a petition in a pending suit (*In Re Bennett*, 12 Nat. Bank. Reg. 257)’ ”.

None of these enumerated “slight acts” were taken by the appellee until December 22, 1933, when he filed his bill for the appointment of a receiver, in which (paragraph 14) he states that he now intends to request the trustee to sell the property, but desires to delay the date of sale. Thus the appellee was unwilling to take possession, did not desire an early sale,

did not demand rents of Shannon and Luchs, rental agents, did not demand rents of the tenants, did not make a demand for possession upon either Poole or Hardee, both appointed under the National Banking Act.

He now asks a Court of conscience, notwithstanding his laches, the National Banking Act and the Common Law, to decree to him the rents he could lawfully have reached by any of these methods.

POINT IV.

We again emphasize that Hardee is a statutory receiver; that this liquidation is a statutory liquidation, and that Court receiverships are not analogous.

Appellee says he "had no adequate remedy at law". Citations under No. III discloses many simple, full, adequate and complete remedies. Appellee's citations all apply to court receivers in possession adversely to the mortgagor. Hardee's possession was not adverse to the mortgagor.

In the present instance the mortgagor was not ousted of possession until January 30, 1934, the date of sale.

Appellee might have legally reached the rents he now seeks, as set out in No. III above. He frankly admits on page 11 of his brief, that he was speculating on the future, and only foreclosed at the insistence of the Receiver.

POINT V.

In neither the notes nor the deed of trust did the mortgagor enter into any promise to pay taxes. In fact the trust deed provides how mortgagee could get any taxes he paid out. In the case of *Cassidy v. Strauch*, 61 App. D. C. 21, plaintiff alleged, and defen-

dant admitted (R. pp. 6 and 14), that Cassidy should hold and apply rents to expenses of operation and charges against the building. Therefore, the facts in this case are totally unlike those in the case at bar.

Section 191, Title 31 of the U. S. Code, otherwise 3466 R. S. cited by appellee in *Cook County Bank v. U. S.*, 107 U. S. 445, was held not applicable to the liquidation of a National Bank.

Nor does the Bankruptcy Act help appellee. The National Bank Code is complete in itself. Of it, the Bankruptcy Act is no part.

Again, this is not a suit to charge the Receiver with taxes paid by appellee,—it is a suit to establish a trust on rents collected by a mortgagor lawfully in possession, because the property mortgaged did not sell for a sufficient sum to pay the secured debt, interest thereon and taxes. The only part of the decision in *New Jersey v. Anderson*, 203 U. S. 483, cited by appellee, which seems to have any possible bearing here, is at page 489, from which I quote:

“and it is urged that to permit a State, under such circumstances to have a preference in the payment of taxes would give to it an advantage which it could not otherwise obtain for want of charge or lien upon the property. But considerations of this character, however properly addressed to the legislative branch of the Government, *can have no place in influencing judicial determination. It is the province of the Court to enforce, not to make the laws, and if the law works inequality, the redress, if any, must be had from Congress.*” (Emphasis ours.)

B. COURT RECEIVERS.

Appellee discusses Court Receivers, but Hardee is a statutory receiver, not a Court receiver.

In *Re Tyler*, 149 U. S. 164, is not in point. It was a petition for a writ of Habeas Corpus filed by Tyler, Sheriff, representing that he is unjustly detained by Cunningham, U. S. Marshal. The Court had appointed a Receiver for the South Carolina Railroad Company and enjoined certain tax collections and executions. Nevertheless, Tyler levied on personal property in the hands of the Receiver, whereupon he was cited for and held in contempt, whereupon Habeas Corpus was procured. The statutes of the State of South Carolina provided, *inter alia*, that the collection of taxes "shall not be stayed or prevented by injunction, writ or order issued by any Court or judge thereof." Although at page 187 the Court says that it is the imperative duty of the Court to recognize as paramount and enforce with vigor the just claims for the prescribed contributions to State and Municipal revenue, the writ of Habeas Corpus was denied.

If Hardee were a Court Receiver, and if appellee had sued for taxes instead of to impress a trust upon rents collected, this authority might have a remote bearing on his contention.

Coy v. Title Guarantee & Trust Co., 220 Fed. 90, was a court receivership. Suit was to recover taxes levied upon personal property. The Court observed that the appointment of a Receiver, and the taking of the property into the hands of the Court does not withdraw it from taxation. Section 570, Title 12, U. S. C. A. p. 424, prohibits the levy, assessment, collection or payment of any personal tax by the Receiver of a National Bank.

The appointment of Hardee did not put the bank property under control of the Court. *Ex Parte Moore*, 6 Fed. (2d) 905-907; *In Re Chetwood*, 165 U. S. 443.

Hammond v. Carthage Co., 8 Fed. (2d) 35, is not in point. We again have a mortgagor ousted of possession by a Court receiver who was collecting rents from numerous parcels of realty. The Court held that the taxes levied were expenses of the receivership.

Bear River Paper & Bag Co. v. Petroskey, 241 Fed., 253, was a suit against Court receivers, for personal taxes, and it is therefor not applicable.

The matter here before the Court is not a suit to collect taxes, but is an effort to impress a trust upon rents collected by a mortgagor while lawfully in possession. The statute under which Hardee is appointed does not permit the assessment, collection or payment of personal taxes.

Appellee cites *Union Trust Co. v. Great Eastern Lumber Co.*, 248 Fed., 46.

In this case the Court ordered real estate in the hands of a Court receiver to be sold. The sole question presented is whether the terms of the decree required the purchaser to pay taxes on the property so sold. The Court held:

“The purchaser at a sale under a judicial decree which does not order the property sold free from the lien of taxes, *takes the property subject to the tax lien.*”

Plaintiff might have brought his suit for taxes, since he was the purchaser of the property (R. p. 26), but that would raise a different issue.

MacGregor v. Johnson-Cowdin-Emmerich, Inc., 39 Fed. (2d), 574, involved a tax on real estate, held by a Court receiver. The Court, after struggling with the

New York Tax Law and the New York City Charter, reached the conclusion that taxes accruing after the court had appointed a receiver, were a part of the expenses of the receivership.

In the case at bar we do not have an action for taxes accruing at any time. **We have an attempt to transmute a claim for taxes into a resulting trust on rents.**

In *Central Vermont Railway v. Marsch*, 59 Fed. (2d), 59, the property of the appellant was in possession of a Court receiver; certain rentals accrued from real estate; taxes had accrued, for which the property had been sold. An order had issued requiring receivers to pay out of funds in their hands, before distribution to creditors, (1) a note given for money to pay taxes, (2) accrued and unpaid taxes, (3) to redeem from tax sales. The Court cited with approval *Hammond v. Carthage Sulphite Co.*, and *MacGregor v. Johnson-Cowdin-Emmerich, Inc.*

STATUTORY RECEIVERS.

The reasoning of the appellee on this subject must be rejected because of the statutory limitations on the appellant. That such a limitation exists is apparent from a comparison of Section 64-a of the bankruptcy act of 1898, with the national banking act, Sections 5234 and 5236, R. S., enacted June 3, 1864.

Congress in the bankruptcy act provided for the payment of all taxes legally due and owing by the bankrupt,—it omitted such a provision from the National Bank Act,—a significant indication that Congress did not intend that this provision should be a part of the National Bank Act. As pointed out in *New Jersey v. Anderson*, 203 U. S. 483, it is not for the courts to legislate.

It is significant that neither in his original, nor in his amended bill did the appellee allege or set up facts to prove that these rents constituted a trust fund; the most that he alleges is that equity and good conscience require that the rents should be paid to him, because the property did not sell for enough to pay loans, expenses, interest and taxes. None of the cases above analyzed in anywise deal with the creation of a trust fund.

Rankin, receiver, v. Emigh, 218 U. S., 27:

In this case large quantities of milk had been furnished to the Jenne Creamery Company to be converted into butter and sold, and the proceeds, with certain deductions, divided among those furnishing the milk. The Jenne Creamery Company, without notice to those furnishing the milk, was taken over by the Berlin Bank. The cashier of the bank acted as manager of the creamery business, signing and endorsing checks in the name of the Jenne Creamery Company. The bank failed in November, 1904; no settlement had been made with those who supplied the milk during October and November, 1904, although bank drafts to the Jenne Creamery Company totaling \$2,520.46 had been received in the bank for such butter, and mingled with other money. The Court found that this sum should be paid to the plaintiffs.

“By virtue of the agreement under which the milk was furnished, the proceeds of the sale of butter belonged to the patrons and was received by the bank for them under a duty to pay it to them.”

* * *

“* * * the milk was received under contracts of bailment and the proceeds arising were the property of milk producers and were held by the bank for them.”

In this case, wholly different from the case at bar, a trustee relationship was plead, and found to exist and the decision turned upon the existence of this relationship.

Central Transportation Co. v. Pullman Co., 139 U. S. 24, is an action of covenant, and has no bearing on the issues here raised.

Pullman Co. v. Central Transportation, 171 U. S. 138.

This is a case in which the defendant company had leased certain rolling stock to the Pullman Palace Car Co. The lease, in a prior action (139 U. S., 24), was adjudged *ultra vires*. A cross bill was filed in this suit to avail of the tender of the return of defendant's property and compensation for its use. The Court, in commenting on the contention of the defendant that the Pullman Company was liable for the earnings of the property during the period it had possession of the same, which is analogous to the rents claimed here by the appellee; said;

“Nor can we accede to the view that the Pullman Company is liable for the earnings of the property which it realized by means of putting such property to the use which the lease provided. It had the right, while both parties acquiesced, to so use the property.”

“There is no question of trustee in this case. Root v. Railway Co., 105 U. S. 189 at 215.”

“The property was placed in its hands by the lessor and in accordance with the terms of the agreement. It was not then impressed with any trust according to any definition of that term known to us.”

CONCLUSION.

Appellee misquotes the Court's decree. The decree is silent as to any application of these rents "*on account of the taxes and first trust interest * * **"

In so far as any of the authorities he relies on are in point, they are against his contention.

Appellee admits the Receiver (appellant) suggested he foreclose (brief pp. 4 and 11). See also Answer to Rule (Rec. pp. 10 and 12). And the record shows that appellee was postponing sale (R. p. 7—par. 14), while appellant was endeavoring to force a sale. Under these conditions appellee's reference to "rackets" in this case is an obvious cloak for his own laches, or attempted speculative venture.

It is submitted appellee's whole argument is so full of misconception, both of the issues involved and the law applicable, as to be misleading.

Briefly, appellee sued for the net rents.

He set up no trust relationship to entitle him to the net rents.

The Court decreed to appellee the net rents, which in passing the Court observed was less than taxes and interest.

The Court did not decree the recovery of the rents to satisfy a lien arising from payment of the taxes and interest. Obviously no such lien existed. There is, therefore, a wide, fatal divergence between appellee's assertion and what the Court actually did.

However, the Court also erred in decreeing that the rents be turned over to appellee.

Hence, it is respectfully submitted the judgment must be reversed and cause dismissed.

HUSTON THOMPSON,
HERBERT S. WARD,
Attorneys for Appellant.

